UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT 70 and LOCAL LODGE 839 (Spirit AeroSystems)

And **Case 14-CB-133028**

RYAN KASTENS, An Individual

And

SPIRIT AEROSYSTEMS, INC.

Respondents' Post Hearing Brief

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To Administrative Law Judge Michael A. Rosas:

Respondents International Association of Machinists and Aerospace Workers, AFL-CIO, District 70 and Local Lodge 839 (referred to jointly as *Respondents* or *the Union*) file their Post Hearing Brief.

Statement of the Case

The Union is the exclusive bargaining representative of all hourly-rated employees in a production and maintenance unit at a plant operated by Spirit AeroSystems, Inc. (*Spirit* or the *Company*) in Wichita, Kansas. (Jt. Ex. 1 at 11). The Union and the Company entered into a collective bargaining agreement (*CBA*) effective June 26, 2010 which will remain in full force and effect pursuant to its terms until June 27, 2020. (Jt. Ex. 1 at 117) This unfair labor practice proceeding is centered on Charging Parties Ryan Kastens and Jarrod Lehman's allegation that the Union breached its duty of fair representation owed to them as bargaining unit employees in violation of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(A), (b)(2).

Specifically, the Charging Parties allege that the Union attempted to cause and caused the Company to investigate, discipline and eventually discharge both Charging Parties because of their so-called dissident union activity; that the Union, through an agent, threatened Kastens with bodily injury and threatened to discriminatorily process his discharge grievance because of his dissident union activity; and that the Union refused to process to arbitration various grievances filed by Kastens regarding his a series of disciplinary actions and discharge by reason of his union activity. (GC Ex. 1-P at 3-4)

On July 18, 2014, Kastens filed an unfair labor practice charge against District 70 and Local Lodge 839 with the National Labor Relations Board in Case 14-CB-133028. (GC Ex. 1-A)

On September 10, 2014, Kastens filed a first amended charge and Lehman joined as a Charging Party. (GC Ex. 1-F; Tr. 530:7-15) Kastens then filed a second amended charge on November 20, 2014. (GC Ex. 1-K) The General Counsel issued a Complaint and Notice of Hearing on November 26, 2014. (GC Ex. 1-P) Respondents filed their Answer on December 10, 2014 and a First Amended Answer on December 17, 2014. (GC Exs. 1-R, 1-T) The General Counsel filed an Amendment to its Complaint on February 11, 2015, and Respondents filed a Second Amended Answer on February 14, 2014. (GC Exs. 1-U, 1-W)

Administrative Law Judge Michael A. Rosas held a hearing in this matter on February 19-20 and 26-27, 2015. On February 26, 2015, when the General Counsel rested his case-in-chief, Respondents filed a Motion to Dismiss Complaint as Amended for failure to make a prima facie case of any violation of the Act. (ALJ Ex. 1) The Judge reserved his ruling on the motion and at the close of the hearing, directed the parties to file post hearing briefs by April 3, 2015.

Statement of Facts

I. Background

A. The Union's Collective Bargaining Relationship with Spirit AeroSystems

The pleadings and evidence establish that at all times relevant to this case, Spirit AeroSystems, Inc. has been an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act. (GC Ex. 1-P at 2). Spirit is engaged in the manufacture and the nonretail sale of aerostructures for commercial, military and business aircraft. The employer maintains its principal office and place of business in Wichita, Kansas. (GC Ex. 1-P at 2) At all relevant times Respondents have been the sole and exclusive bargaining agent for "all employees working in the production and maintenance classifications, excluding classifications currently represented by other bargaining units, employed by the Company at its Wichita, Kansas facility."

(Jt. Ex. 1 at 11; GC Ex. 1-P at 3) There are approximately 7,000 unit employees. (Tr. 27:1-6)

Spirit employed Charging Party Ryan Kastens as a sheet metal mechanic and then as a fuel cell sealer from January 8, 2010 until his discharge on March 5, 2014. (Tr. 126:6-19) During his employment with Spirit, Kastens was a member of Local Lodge 839. (Tr. 126:20-127:3) Spirit employed Charging Party Jarrod Lehman as an underwing mechanic from October 26, 2007 until his discharge on March 6, 2014. (Tr. 233:2-11) Lehman was also a member of Local Lodge 839 at all relevant times. (Tr. 233:15-19)

B. Kastens's Extensive Disciplinary Record

Before the events which led to his suspension and eventual termination in early 2014, Kastens had already developed a substantial disciplinary record. Nevertheless, throughout his entire employment at Spirit, the Union and its officers supported and defended Kastens at every step of the way. In two instances when the employer sought to discipline Kastens for poor job performance involving a drilling technique used on certain parts, Howard Johnson, an In-Plant Representative of Local Lodge 839, intervened on Kastens's behalf and persuaded management to not to make a disciplinary record of those job failures. (Tr. 301:14-302:25)

On March 14, 2013, Kastens received a verbal warning for parking in a no-parking zone and failing to display his parking pass. (Jt. Ex. 10 at 5) Spirit documented the warning and noted that his failure to observe parking regulations was a recurring issue. (Jt. Ex. 10 at 5) On May 6, 2013, less than two months later, Kastens received a written warning for engaging in the same misconduct. (Jt. Ex. 10 at 4) Then, on November 8, 2013, the Company imposed a three-day suspension against Kastens for an unexcused absence and his failure to report to management on November 4. (Jt. Ex. 2) That disciplinary form stated in part: "Future incidents of this nature will result in further corrective action up to and including termination of employment." (Jt. Ex. 2)

Regarding the November 8, 2013 suspension, Kastens testified that he had been in involved in a union training class in Maryland the prior week and that he had chosen to remain in that state over the weekend, and that he had arranged a return flight on Monday, November 4. (Tr. 129:1-130:2) He was scheduled to work that Monday but failed to notify his supervisor that he would not be present. (Tr. 129:18-23) Kastens was the only employee who attended the union training class who failed to report for work as scheduled on November 4. (Tr. 466:3-20)

Frank Molina, President of District 70, testified that Kastens asked him to send an official written notice to Spirit justifying Kastens's decision to remain in Maryland over the weekend when the Charging Party was not involved in union activities. Molina refused, explaining that it would be unlawful to falsify such records. (Tr. 103:13-104:3)

This was not the first time Kastens had made such an improper request to Molina. (Tr. 104:9-105:7) After Molina refused to falsify the excuse letter, Kastens made the same request of Assistant Directing Business Representative Becky Ledbetter. She also refused and explained that falsely representing to the employer that Kastens had been on union business during his entire absence would violate Department of Labor regulations. (Tr. 349:23-352:8) Kastens filed a grievance challenging that suspension, but the employer never removed the disciplinary action from his personnel records. (Jt. Exs. 3, 2)

Kastens's next disciplinary incident occurred less than one month later on December 6, 2013. The disciplinary action form issued on that date stated in relevant part:

> Ryan, you misused company time and misrepresented yourself as a union steward in investigating an issue in the shop area when in fact you are not a union steward or union official. This misuse of company time and misrepresentation of yourself is unacceptable behavior per OP3-179, Disciplinary Guidelines and will not be tolerated.

(Jt. Ex. 4)

Spirit's Disciplinary Guidelines provided for a progressive system of discipline under which an employee normally would be discharged if he received any additional disciplinary action following a suspension. (Jt. Ex. 14) Robbin Ketterman, who supervised Kastens at that time, testified that she intended to discharge him for his misconduct in December 2013. (Tr. 462:25-463:4) She stated it was unheard of for an employee to receive more than one suspension before facing termination:

Q Okay. You said you were in Management for how many years total?
A 28.
Q Do you recall -- I mean, have there been other situations that you were aware of an employee like Mr. Kastens that has had more than one three-day suspension and survived?
A No.
Q Was that through Spirit?
A Yes.
Q Was it also true at Boeing?
A Yes.

(Tr. 464:5-16)

However, Molina intervened on Kastens behalf and saved his job by convincing the supervisor to reduce the punishment to a three-day suspension:

Q All right, so -- before you had any discussion with Mr. Molina, just so I am clear, what action were you contemplating or intending to take with respect to Mr. Kastens?
A On the December 1, I was going for termination.
Q All right, and -- but he was not terminated?
A Huh-uh. No.
Q All right, and was that following -- was that changed following your discussion with Mr. Molina?
A Yes, it was.
Q Okay, and what did Mr. Molina say, if anything, that caused you to change your mind about the firing of --
A . . . He wanted me to hold off on termination and give him another chance instead of going for the termination due to this being the second suspension.
Q BY MR. TANNER: All right, and then did you – did you accept that plea by Mr. Molina?
A Yes, I did.

(Tr. 462:25-464:4)

Rather than immediately discharging Kastens, Ketterman included a Last Chance Agreement in his disciplinary action form, which provided: "Upon receipt of this 4th Disciplinary Memo, if you receive any type of discipline in the next 12 months, you will be terminated for generally unacceptable misconduct." (Jt. Ex. 4; Tr. 91:22-93:6; Resp. Ex. 9) At hearing, Justin Welner, Spirit's Vice President of Human Resources and Environmental Health and Safety and Building Maintenance, testified that the last-chance provision has significant ramifications:

> A The significance of it is being called out in our Disciplinary Guidelines. Once you get four disciplinary actions in a year, you basically have to go twelve months without getting another or you are terminated.
> Q And what happens if you -- based on the Spirit policy, if you get a fifth disciplinary within a year?
> A You are terminated?
> Q Is that automatic?
> A That is automatic.

(Tr. 519:1-17; Jt. Ex. 14 at 6-7) Becky Ledbetter testified that throughout her long career as a Union official at Spirit and its predecessor, The Boeing Company, no employee had ever received a second suspension in lieu of discharge. (Tr. 346:24-347:16) Molina's accomplishment in saving Kasten's job in December 2013 was unprecedented. *See id.*

At hearing, Kastens acknowledged that when he disseminated the confidential security video that led to his discharge, he had four disciplinary actions on his record within the previous twelve months. (Tr. 195:10-16) He filed a grievance regarding the misuse of company time suspension on January 2, 2014. (Jt. Ex. 5)

II. The Charging Parties' Dissemination of Spirit's Confidential Security Video

A. Lehman and Kastens Disseminated the Security Video by Electronic Mail

On January 27, 2014, Charging Party Jarrod Lehman sent an e-mail from his work account titled *Why you should always look both ways* to nine different e-mail addresses, two of which were directed to persons outside of the Spirit e-mail system. (GC Ex. 8 at 5) (copy of e-mail included in the employer's security investigation report). Lehman noted the location of the subject incident in the body of the e-mail as *MacArthur crossing Wichita, Ks.*, and he attached a video recorded by a Spirit security camera that was directed toward an intersection between two gate entrances to the Company's plant. (GC Ex. 8; Jt. Ex. 20)

The attached video, approximately two minutes in duration, showed a collision between a truck and a Spirit scooter on December 26, 2013. (Jt. Ex. 20) Lehman confirmed that the video had a date and time stamp reflecting the date of the collision, which indicated that the video was captured from a camera such as a security or traffic camera. (Tr. 249:23-250:12) Lehman also stated that at the time he gave his affidavit to the NLRB, he believed that the video probably originated from the Company's Security Department. (Tr. 257:3-6)

Kastens was one of the recipients of Lehman's e-mail. (GC Ex. 8 at 5) Soon after he received the e-mail and attachment, Kastens forwarded it to approximately 71 different e-mail accounts, 11 of which were outside the Spirit e-mail system. (GC Ex. 8 at 3-6; Tr. 194:20-195:6)

The confidential security video was rapidly disseminated in the plant as a result of Lehman and Kastens's e-mails. Due to this widespread dissemination of the video, a number of unit employees who received or otherwise viewed the video contacted various Union representatives -- including Becky Ledbetter and In-Plant Representative Howard Johnson -- to inquire why the video was being circulated because such a confidential video had never been

released to employees on the floor before. (Tr. 335:17-24; 290:21-291:3)

Ledbetter testified that Reggie Maloney was one of the unit employees who contacted her regarding the video. (Tr. 336:4-11) Maloney was a Maintenance Mechanic and a Union member in January 2014. (Tr. 385:20-386:8) He testified that at some point after the security video was forwarded by Lehman and Kastens, he viewed it on a computer in Terry Flynn's shop on the employer's premises. (Tr. 386:18-387:24) The video was attached to an e-mail that had been sent to another employee's work account. (Tr. 387:1-10) Soon thereafter Maloney saw the video again, this time in his oiler crib in the maintenance department. (Tr. 388:15-389:1)

Maloney testified that upon seeing the video, he knew it depicted a Spirit scooter used by maintenance employees and that co-worker Roger White was driving the scooter at the time of the accident. (Tr. 389:21-390:16) Maloney stated that in the past he had driven scooters in performing maintenance duties, but he was no longer able to drive them because of a medical condition which caused him to have an accident while driving a scooter. (Tr. 391:3-23) He stated that there can be serious disciplinary consequences for an employee who is involved in a scooter accident, and that the Company required such employees to complete a probationary period before they were permitted to operate a scooter again. (Tr. 391:24-392:7)

Maloney was not aware of White's accident before he was shown the security video circulated by Lehman and Kastens. (Tr. 395:7-12) When Maloney saw the video, he became concerned as to whether the video of his scooter accident would also be made public through circulation to Spirit e-mail accounts. (Tr. 392:21-393:9) For this reason, he contacted Becky Ledbetter and asked her to look into the reason that the White video was being circulated. (Tr. 387:25-389:15)

After being contacted by Maloney and other unit employees, Ledbetter (to whom Kastens

had previously e-mailed the video) forwarded the video to Kenneth Tullis, who was the Union's First Shift Full-Time Safety Representative. (Resp. Ex. 12; Tr. 334:12-25) In that capacity, Tullis was responsible for addressing all matters related to workplace safety, accidents and injuries throughout the entire plant. (Tr. 335:1-3) Ledbetter asked Tullis to call her to discuss the video. (Resp. Ex. 12)

Ledbetter also forwarded the e-mail with attachment to Howard Johnson, an In-Plant Representative of Local Lodge 839 who handled matters for maintenance employees, and Jason Baze, who was in training with Johnson to succeed him as In-Plant Representative and who occasionally received e-mails on behalf of Johnson. (Tr. 335:9-338:22) Ledbetter asked Johnson to look into the matter and determine why the video was being circulated. (Tr. 338:6-9) She testified that her only objective in contacting Johnson was to have the security video removed from the shop floor:

Q All right, did you make any requests of Mr. Johnson?
A I asked if he could help me get it off the floor.
Q And was that the purpose of your communication to Mr. Johnson?
A That was solely the purpose.
Q All right. Did you ever ask anyone in Spirit's Management to look into the conduct of Ryan Kastens or Jarrod Lehman?
A No.
Q Did you ever request Spirit Aerosystems to conduct any sort of investigation of Ryan Kastens or Jarrod Lehman?
A No.
Q Did you ask the Company, any Company official or representative to open any sort of investigation about this matter?
A No.
Q Okay. Would you have sent these e-mails to Mr. Johnson, Mr. Baze, and Mr. Tullis but for your discussions with Mr. Maloney and others?
A No . . .

(Tr. 343:2-23)

Johnson testified that by the time he was contacted by Ledbetter, numerous unit employees throughout the plant had called him and asked whether he had seen the accident video

and why it was being circulated. (Tr. 290:21-292:3) Johnson had a close relationship with unit employees in the maintenance department because he had been a Building Maintenance Millwright for approximately 32 years. (Tr. 340:21-341:18) And Ledbetter had worked as a Maintenance Mechanic at Boeing and then Spirit for 15 years, so she also had a close connection to employees in that department. (Tr. 340:1-20)

In response to these inquiries and concerns expressed by various unit employees, Johnson contacted Jeff Black, Senior Manager of Labor Relations, via e-mail and asked the following:

> We were told that this video shouldn't have been released …. im getting calls about this, people are forwarding this message internally as well as outside spirit. What is the deal with this video?

(GC Ex. 8 at 2) (punctuation and capitalization in original). Johnson testified that he did not review the e-mail to determine who had sent the original e-mail, and he was not aware that either Kastens or Lehman had disseminated the video. (Tr. 296:9-21)

B. Relevant Company Policies

At all relevant times Spirit maintained several policies governing the use of electronic mail and the release of Company information outside of Spirit. The Company's *Information Assurance Program Acceptable Use Policy*, designated as OP15-810, sets out the policy and rules relating to the acceptable use of computer systems and resources by employees. (Jt. Ex 11) The policy provides in pertinent part: "Users shall not provide Spirit information to parties outside Spirit, unless authorized by the information owner and Communications. See OP2-17, *Release of Information Outside Spirit AeroSystems*. (Jt. Ex. 11 at 7) It states that employees who use their personal e-mail accounts "must ensure that personal e-mail does not adversely affect the company or its public image or that of its customers, partners, associates or suppliers" and

further ensure that any personal use of Spirit computer resources "would not cause embarrassment to the company." (Jt. Ex. 11 at 11, 15)

The Acceptable Use Policy also states that anyone using Spirit computer systems acknowledges that "unauthorized access or misuse is prohibited, and subject to disciplinary action," and "[u]sers must understand that personal use of Spirit e-mail is not private and is subject to legal discovery and disciplinary action." (Jt. Ex. 11 at 6, 14) The policy further provides: "Spirit sensitive and proprietary information shall only be transmitted by secure methods e.g. virtual private networks (VPN), Secure File Transfer. Sending sensitive business information using public e-mail systems are prohibited e.g. Gmail, yahoo, hotmail." (Jt. Ex. 11 at 15)

Spirit also maintains electronic versions of its e-mail policy, mostly in an outline or FAQ format, several of which were presented as joint exhibits at hearing. Those e-mail rules prohibit the release of Company information via electronic mail to external recipients, mandate that information sent by e-mail must not cause embarrassment to the Company, and prohibit employees from auto-forwarding electronic mail or sending chain e-mails. (Jt. Ex. 12) Regarding sensitive information, the internet and electronic mail policy requires a user to encrypt any information that could, if disclosed, harm Spirit's competitive position in the marketplace, damage its brand, or create negative customer perceptions or distrust among other circumstances. (Jt. Ex. 12 at 4)

The policy also set out guidelines for the use of cameras on Company premises. The *Camera-enabled Devices* rule states: "Possession of non-Spirit camera-enabled devices may be allowed in some areas by local management or policy, but in all cases a Camera Permit is required to use the camera feature. Employees or visitors must not use the camera feature of

devices on company premises unless authorized to do so in accordance with company procedures." (Jt. Ex. 12 at 5) The policy then outlines requirements and procedures related to the use of camera permit badges. (Jt. Ex. 12 at 5)

Spirit AeroSystems also maintains a policy titled *Release of Information Outside Spirit AeroSystems* (designated OP2-17) which "addresses responsibilities of the company, organizations, and individuals when releasing Spirit AeroSystems information outside the company." (Jt. Ex. 13 at 1) The policy expressly applies to Company "[i]nformation disseminated through any medium, including . . . audio or video recordings and transmissions; photo or video; printed documents; e-mail; and the Spirit Web, the World Wide Web, or similar electronic networks." (Jt. Ex. 13 at 1-2) It delineates a number of criteria which must be met before any Company information is distributed outside the Company, including:

> 1. The information must be reviewed and approved by Corporate Communications personnel who have authority to do so by delegation of the VP, Corporate Communications & Public Affairs.
>
> . . .
>
> 3. There must be minimal risk that the information will have an adverse effect on the company's reputation or its relations with employees, customers, suppliers, or other important constituents, unless overriding company or public interests clearly exist.
>
> 4. The information must not contain proprietary data unless the data has been approved by Intellectual Property specifically for external release.

(Jt. Ex. 13 at 3-4) Moreover, OP2-17 establishes that a lack of security classification on source data does not release a writer or speaker from the requirements of both government security and company policy. (Jt. Ex. 13 at 5)

Justin Welner, who oversees the implementation and administration of all of these policies, testified:

Q All right. From your standpoint as an officer of the Company, what is the -- the reason for the policy that is reflected in OP2-17?
A Well, there is a variety of reasons, depending on what the information is, but there is privacy laws, there is liability issues, security issues, you know. It is kind of a hard question to answer without knowing specifically what was released, but this is intended to protect the Company from having confidential and proprietary information released.
Q All right. Well, in the case of -- would this policy prohibit the unauthorized release of a security video?
A Absolutely it would.

(Tr. 514:7-20)

Jason Neal, Senior Manager of Security, also testified regarding the reasons that the employer has policies in place to protect its proprietary information, including its security video footage. Neal first stated that upon viewing the video disclosed by Lehman and Kastens, it was clear that the recording was made by a Spirit security camera on MacArthur Street between two entrances into the company's campus and that the scooter involved in the collision was a Spirit vehicle. (Tr. 279:10-281:8) It was also clear that the video was recorded by a stationary camera, which is a fact that the Company seeks to protect from unauthorized disclosure:

A Yeah. I think it does show blind spots. It shows that that camera is not moving, so anything outside of that area would not be captured on it.
Q Is that information you would want to see disclosed outside of your security tape?
A No.
Q Why not?
A Just for that reason, we don't want people knowing that an area of a parking lot is available, you know, for whatever purposes, or turnstyles, you know, to sneak through or tailgate through. So we don't want anybody seeing our cameras.

(Tr. 282:24-283:10)

Neal further explained that the Company takes precautionary measures to ensure that security videos – including the one disclosed by the Charging Parties -- are not shared with all employees or released to the general public. Spirit's security team restricts the disclosure of this

video footage to supervisors who are involved in an investigation. (Tr. 283:20-22; 284:14-15) Any video clip from a security camera is transferred to a disk, identified with a report number, entered in a case file, and then stored in a locked room to protect the confidential information maintained in the visual recording. (Tr. 284:6-13)

Further, the parties offered testimonial and documentary evidence regarding Spirit's disciplinary policies. The Disciplinary Guidelines, designated OP3-179, apply to all Spirit locations worldwide and were approved by Justin Welner. (Jt. Ex. 14 at 1) These guidelines established a discipline scheme which generally involves the following progressive disciplinary steps: verbal counseling with written documentation; written documentation such as a disciplinary memorandum; suspension with or without pay; and termination of employment. (Jt. Ex. 14)

Section 3.4 of the guidelines set out the types of violations designated as *Unacceptable Behavior – 1st Offense, termination*. (Jt. Ex. 14 at 6) Those offenses, which warrant discharge in the first instance, include:

> L. Unauthorized disclosure of Company trade secrets and private or confidential information to employees, customers, friends, relatives, general public or new media or making unauthorized representations by speaking on behalf of the Company.
>
> M. Generally unacceptable conduct where the employee had accumulated four disciplinary actions within a year, and received a fifth disciplinary action for any reason during the year following the fourth disciplinary action."

(Jt. Ex. 14 at 7). Regarding subsection L, Welner testified as follows:

> Q BY MR. TANNER: In your experience, has – does Spirit Aerosystems regard this type of disclosure of protected information as a terminal offense standing alone?
> A Yes. It is called out that way in our Disciplinary Guidelines.
> Q And has Spirit Aerosystems, to your knowledge, discharged other employees for the same or similar offenses?
> A Yes, we have.

(Tr. 517:6-15)

C. Investigation and Discharge of the Charging Parties

At hearing, Kastens admitted that using Spirit's computer resources and e-mail system to transmit the security video was a violation of the internet and e-mail policies, and that external disclosure of the video to people who were not employees also violated Company policy. (Tr. 196:22-197:3; 195:2-9) Lehman also admitted that disclosure of the video via e-mail violated Company policy, and that such disclosure was severe misconduct which called for first-offense discharge under Section 3.4L of the Disciplinary Guidelines. (Tr. 268:7-13; 269:23-270:8)

On February 13, 2014, security personnel escorted Kastens out of the plant pending an investigation of the disclosure of the confidential video. (Tr. 143:5-144:21) He was suspended pending the outcome of the investigation. On February 14, Kastens filed a grievance contesting his suspension directly with District 70 and he conferred with Frank Molina regarding the matter. (Tr. 145:9-18, 146:2-21) Kastens testified that he submitted the suspension grievance to the District rather than to Local Lodge 839 because In-Plant Representative Tim Johnson had been unable to settle two prior grievances and had transferred those grievances to the District. (Tr. 146:2-10)

Spirit also removed Lehman from the facility and suspended him pending an outcome of the investigation on February 14. (Tr. 240:2-11) He promptly filed a grievance regarding the suspension. (Tr. 240:12-17; Jt. Ex. 15)

On February 24, Lehman was interviewed and presented a signed statement to a security investigator regarding the circumstances under which he obtained and then disclosed the confidential video. (Tr. 241:8-242:11; GC Ex. 20) Lehman told an investigator that he did not know where the traffic accident recorded in the video had occurred, but he described the exact

location of the accident in detail when he gave a subsequent statement to the NLRB. (GC Ex. 20; Tr. 250:24-252:19)

A security investigator interviewed Kastens on February 25. (GC Ex. 2) Kastens admitted that he had sent the video to numerous employees and eleven others not employed by Spirit whom he thought "would have been interested to see" the video. (GC Ex. 2) He claimed that he did not know how Lehman had acquired the video. (GC Ex. 2)

On March 3, Spirit investigators interviewed Lehman again by phone regarding two Facebook postings he had made. (GC Ex. 13) One posting was a photo Lehman had taken of himself on the shop floor in violation of the *Camera-enabled Devices* policy discussed above. (GC Ex. 11; Jt. Ex. 12) In a signed statement memorializing that interview, Lehman admitted: "I've heard that we can't take photos in the shop. It is my understanding that we can't take any pictures in the plant." (GC Ex. 13 at 3)

Then, on March 5, 2014, Spirit discharged Kastens. (Jt. Ex. 7) The Company's disciplinary action form stated: "Ryan, an investigation has revealed that you forwarded an e-mail external to the Company which contained a Spirit video. This behavior is unacceptable and will not be tolerated." (Jt. Ex. 7).

On March 6, Spirit discharged Lehman. (Jt. Ex. 9) The disciplinary action form prepared in connection with his discharge stated: "Jarrod, an investigation revealed that you forward [sic] an e-mail external to the Company which contained a Spirit video. You also had a picture posted on your Facebook account of you which was taken in a Spirit shop area. This behavior is unacceptable and will not be tolerated." (Jt. Ex. 9)

III. The Union Investigated and Processed the Charging Parties' Grievances in Good Faith

As stated above, Kastens and Lehman each filed a grievance challenging his suspension.

(Jt. Exhibits 6, 16) Both Charging Parties called Frank Molina to inform him that they had been suspended for violation of company policy. (Tr. 543:14-544:8) Kastens conferred with Molina on a number of occasions soon after he was suspended, and Molina informed Kastens that he was looking into the suspension and surrounding circumstances. (Tr. 147:15-18) At the outset, Spirit informed Molina only that Kastens's suspension was related to an e-mail. Molina conveyed this information to Kastens in the week following his suspension, and the Union official assured Kastens that he would follow up once he received more details. (Tr. 147:19-148:14) After the Company concluded its investigation and discharged Kastens and Lehman, their suspension grievances became were converted to discharge grievances. This explains why the grievance forms were designated *S/T* by the Union. (Tr. 548:1-8; Jt. Ex. 15)

Molina had several discussions with Kastens and Lehman regarding the progress of their grievances throughout the Union's investigation and processing of the grievances. (Tr. 553:16-25) At the outset, In-Plant Representative Tim Johnson was responsible for investigating and pursuing the grievances. (Tr. 567:8-10) At Molina's direction, Johnson represented the Charging Parties' during their interviews by Company investigators and attempted to resolve the grievances. (Tr. 567:8-16, 551:22-25) Johnson made investigation notes for the Union's grievance files, which Molina described as thorough. (Tr. 561:18-562:2) Kastens testified that he never expressed any concern about Johnson's investigation of his grievance. (Tr. 578:7-9) Indeed, as Molina testified:

> Q All right. But did Mr. Johnson - based on your review of the Union's file did Mr. Johnson conduct an investigation, too?
> A He did. He did the first investigation.
> Q All right. To your knowledge did Mr. Lehman or Mr. Kastens make any comments about the work that Mr. Johnson had done on the grievances?
> A Yes. They had both actually told - thanked him for what he had done. He had done a good investigation.

(Tr. 544:18-545:1)

On the other hand, In-Plant Representative Howard Johnson played no role whatsoever in the investigation or processing of the discharge grievances. (Tr. 298:19-24) Johnson testified it was his understanding that Molina handled the grievances. (Tr. 298:25-299:12) He explained that as an In-Plant Representative, he would often try to resolve grievances at Step One or Step Two (as Tim Johnson had done in this case), but that when Step Two was completed he would transfer the grievance to the District for further processing. (Tr. 298:8-18)

Howard Johnson never had any discussions with Molina about Kastens's discharge grievance or Lehman's discharge grievance; Johnson never discussed the grievances with the Union's counsel; and he in no way influenced Molina's decisions with respect to the processing or settlement of the grievances. (Tr. 299:13-19, 507:14-18, 97:24-98:9)

When Tim Johnson was unable to resolve the discharge grievances, Molina stepped in and prosecuted them. (Tr. 567:8-18, 544:12-545:6) Johnson sent Molina a formal referral letter regarding Kastens's grievance, which stated:

> I am referring this grievance to you and your staff for review. According to the grievance procedure, this grievance has been discussed at Step Two of the procedure and was not settled.
>
> I have made attempts to settle this grievance, as In-Plant Representative; however, I am now forwarding this grievance to your office.

(Jt. Exs. 5 at 3, 19)

After Molina assumed responsibility for pursuing the grievances, he discussed the status of the investigation with Tim Johnson. (Tr. 552:18-21; 551:1-9) Molina also interviewed Kastens in person sometime before February 27, after Kastens was suspended but before he was discharged. (Tr. 568:9-23, 575:4-11) Molina gathered as much information as he could in the interview and then sent a written information request to the employer requesting all relevant

documents pertaining to the Company's decision to discharge Kastens. (Tr. 548:9-549:3)

Molina submitted written information requests on behalf of Kastens and Lehman to Jeff Clark, Director of Labor Relations. (GC Ex. 7; Tr. 39:16-40:6) It is Molina's standard practice to submit written information requests to the Company under the NLRA seeking several categories of information and documents in order to aid the Union's investigation and assessment of a pending discharge grievance. (Tr. 39:16-40:2) He follows this standard practice on every occasion that he handles a discharge grievance based on his training and experience as a union representative. (Tr. 550:6-25) Spirit usually provides information that is responsive to such formal requests. (Tr. 40:10-12)

In this regard, Kastens admitted on cross-examination that by the time Spirit had disclosed a substantial amount of information to Molina in response to the information request, the Union official had all of the documents and information he needed to fully process the grievance so it was no longer necessary for Kastens to provide any additional information:

> Q Well, didn't you know as a trained Union Representative that you had the opportunity or the ability to give Mr. Molina any facts that you thought were relevant? Didn't you know that?
> A At that time, no, because he had all the files. He had all the information he should have needed.
> Q Okay. But you knew Mr. Johnson had investigated your termination grievance at the first two steps, didn't you?
> A Yes.
> Q Okay. And that Mr. Molina would have access to all the investigation conducted by Tim Johnson, right?
> A Yes.

(Tr. 577:10-21)

Soon after Molina had collected additional documents and information from the Company, he sought the advice of counsel regarding the merits of both discharge grievances and a strategy for pursuing the grievances. He conferred with Tom Hammond, a Wichita labor

attorney. (Tr. 553:6-15, 96:23-25) Hammond testified that the IAM has been his principal union client since the mid-1980s. (Tr. 483:20-484:8) He has represented the Union in numerous labor disputes:

> Q And in your capacity as an attorney for District Lodge 70, have you ever had occasion to represent the Union in civil litigation?
> A Yes.
> Q And have you represented the Union in labor arbitrations?
> A Yes.
> Q What other services do you provide to District 70, or have you provided District 70 over these past years?
> A I have represented them on different claims, for the Human Rights Commission or the EEOC. I have helped them with contract negotiations. I have represented them whenever we have had a strike, be it at Boeing or Lear Jet or wherever, since the 80's. I -- I represent them in a capacity where I may get calls on a daily -- on a regular basis from different representatives be they In-Plant Reps or Stewards or Business Reps, and it could be on contract interpretation, it could be on a suspension, it could be on a termination, just problems in the plant. I have represented them not usually in negotiations but I have provided help to them when they are in contract negotiations with different things, especially as they apply in Kansas. I am sure there are -- I have represented them in testimony before the -- both the Kansas House and Kansas Senate on different labor issues. I am sure there are others, but I can't think of them.
> Q As a substantial part of your ongoing representation of District 70, do you provide services in arbitration?
> A Yes, both in arbitrating cases and in Machinists' Union, a lot of times their reps will arbitrate the cases themselves and not have an attorney, and I will help them, at times, prepare for that. I sometimes review files or look at files when someone has been suspended or terminated or there is a Union versus a company grievance, as to whether to proceed to the next step, and that kind of thing.

(Tr. 484:20-486:10)

Regarding the Kastens and Lehman discharge grievances, Molina informed Hammond that he present various documents for the attorney's review and analysis. (Tr. 492:22-493:7) Dayna Bryant, Molina's Administrative Assistant, sent the documents to Hammond via electronic mail on March 18, 2014. (Resp. Ex. 6) The documents included the disciplinary action forms, grievances, and relevant policies. (Id.) Hammond, who already had a copy of the parties'

collective bargaining agreement and was familiar with Spirit's discharge policies, reviewed all of the relevant documents soon after he had received them. (Tr. 509:7-22)

Sometime between March 18 and April 1, 2014, Hammond contacted Molina to discuss the matter and to express his legal opinion about the merits of both discharge grievances. (Tr. 493:8-18, 553:16-17) Hammond advised Molina that it was extremely unlikely the Union could succeed in arbitration on either grievance. (Tr. 495:5-497:20) Hammond testified that reaching his opinions and conclusions regarding Kastens's grievance was not difficult because Kastens was discharged for a first-time terminable offense which had been applied to other employees in the past; he had a history of several progressive disciplinary actions within a period of 12 months; and he was subject to a disciplinary term that the attorney considered a clear and unequivocal Last Chance Agreement. (Tr. 495:10-496:4) Hammond also concluded that the Union would not prevail in arbitration on Lehman's grievance, and he conveyed this opinion and its basis to Molina by April 1, 2014. (Tr. 496:5-497:1)

Hammond explained that the following language in the notice of Kastens's suspension dated December 6, 2013 constituted a Last Chance Agreement: "Upon receipt of this 4th Disciplinary Memo, if you receive any type of discipline in the next 12 months, you will be terminated for generally unacceptable misconduct." (Jt. Ex. 4; Tr. 504:13-505:7) Hammond stated that in his long career, he had never known or heard of a discharge case in which a labor organization had overcome a last chance term and prevailed in arbitration. (Tr. 497:24-498:11) Further, Molina searched the Union's archives for past arbitration awards dating back to the early 1940s and he was unable to find a single award which could support the Union's position in arbitration. (Tr. 555:1-13)

In early March 2014, upon completion of his intensive investigation and after conferring with counsel, Molina decided not to pursue the grievances to arbitration. (Tr. 555:16-22, 73:13-24) He testified that his decision not to arbitrate was based on the following factors:

> We had -- for one we have a complete library of all the cases that we've arbitrated in the past. Richard Alridge's case that we have in evidence that was going over a last-chance issue, discussions with Tom Hammond -- actually the biggest factor was what actually was pending in the case. What it actually had to do with the policies and the violation. But after speaking with Tom Hammond, I'm the Steward over the Machinists' Union in Kansas and their money, and I've got to make that decision whether to spend the money on arbitration, if it's got that viable and I have, you know, some discussions with Tom Hammond, some guidance with him, and I've had some with Mark Love over these issues.

(Tr. 554:13-25; Resp. Ex. 11)

Molina then informed Lehman of his determination that arbitration was not feasible and that, as a result, he would seek to settle the discharge grievance. (Tr. 555:23-556:21) Lehman expressed his appreciation to Molina for his efforts. (Tr. 556:23-24, 267:18-20)

Once he decided not to take the grievances to arbitration, Molina instead attempted to reach the best possible settlement for both Kastens and Lehman. In discussions with Jeff Clark, Molina first attempted to have both individuals reinstated, including an offer to include last chance agreements in the proposed settlements. (Tr. 562:3-13, 563:2-6) When the Company adamantly refused to consider reinstatement for either Charging Party, Molina then sought a cash settlement of $50,000 for each Charging Party to settle their grievances. (Tr. 562:12-18) Clark vigorously resisted Molina's settlement efforts, and the District's President finally negotiated settlements of $5,000 for Lehman and $2,000 for Kastens. (Tr. 562:24-563:1; Jt. Exs. 8, 16 at 3)

On May 8, 2014, Clark presented draft settlement agreements to Molina in the amounts requested. (GC Ex. 15 at1) On May 12, Clark sent revised settlement agreements, which removed a grievant release clause. (GC Ex. 15 at 2; Tr. 78:10-23) Later that day, Molina

forwarded the proposed settlement language to Ron Eldridge, IAM Aerospace Coordinator, and Don Barker, who was then a Grand Lodge Representative for the IAM's Southern Territory, and asked both Union officials to review the language and suggest revisions. (GC Ex. 15 at 3-4) Both Eldridge and Barker approved of the agreement language via electronic mail. (GC Ex. 15 at 3-4) Molina then informed both Kastens and Lehman that he had negotiated a settlement that resolved their grievances. (Tr. 266:13-267:1, 152:21-153:4) Kastens and Lehman received settlement checks from the Company, and both cashed the checks. (Tr. 266:22-266:23, 186:1-4, 99:6-13)

IV. Kastens Instigated a Verbal Confrontation with Howard Johnson

A number of witnesses testified regarding events that took place at an entrance to Spirit's facility on April 11, 2014. At that time the Grand Lodge was in the process of conducting an election of officers and various candidates were engaged in a campaign. Union members at Spirit voted at the Union Hall in Wichita on April 12, 2014. (Tr. 206:5-9) Kastens, who had been discharged several weeks earlier, went to the Spirit plant on the afternoon of April 11 in order to hand out campaign literature on behalf of a slate of candidates headed by Jay Cronk, who was seeking election to the office of International President. (Tr. 157:3-22, 205:6-9, 206:5-17) Cronk and Kastens stood on opposite street corners, separated by five traffic lanes at two gates on Oliver Street which constituted the main entrance to the plant. (Tr. 362:9-24; Resp. Ex. 13)

District 70 Assistant Directing Business Representative Becky Ledbetter, Organizer Juan Eldrige, and In-Plant Representative Howard Johnson were also present; they had gone to the location together in one vehicle to campaign. (Tr. 355:5-16, 402:14-19) Ledbetter went to the street corner where Kastens stood, greeted and hugged him, and spoke to him briefly. (Tr. 362:9-13; Resp. Ex. 13) Eldridge and Johnson stood on the opposite street corner in closer proximity to Cronk's position. (Resp. Exhibits 13, 13A)

The Union officials had decided to distribute campaign literature at that particular time because shifts were changing, which meant that hundreds of employees would pass by the officials while entering or exiting the facility. (Tr. 355:17-23) The shift changes occurred between the hours of 2:00 and 4:00 p.m. (Tr. 430:2-9) At some point after Ledbetter, Eldridge and Johnson had arrived and began distributing campaign materials, District 70 Business Representatives Steve Elder and Brent Allen also arrived to campaign in that area. (Tr. 419:1-12, 429:11-430:9) Elder and Allen drove to the location in separate vehicles. (Tr. 375:11-16)

Soon after Ledbetter had greeted Kastens, he turned his attention to Johnson, who was standing across the street. Kastens charged across the street -- which was described by witnesses as five lanes of traffic over a distance of 30 yards -- to confront Johnson. (Tr. 362:13-364:4, 361:12-15, 408:19-409:7, Resp. Ex. 13) Kastens immediately intruded in Johnson's space only inches from his face and began shouting at him, repeatedly yelling, "Hit me!" (Tr. 304:2-8, 306:24-307:4, 407:21-25, 421:10-13, 431:1-10) Kastens attempted to provoke the Union official into striking him, inviting Johnson to "take his best shot." (Tr. 159:9-11, 444:5-14) Kastens admitted at hearing that he "was upset and emotions took over." (Tr. 190:1) He stated that this verbal exchange was witnessed by Union representatives Steve Elder, Juan Eldridge, Becky Ledbetter, Brent Allen, and Austin Ledbetter, Local Lodge 839 Educator. (Tr. 193:5-20)

While Kastens berated Johnson relentlessly, Johnson did not "take the bait" and strike Kastens or take any other offensive action. (Tr. 410:10-12, 432:5-10) Kastens and Cronk alleged that Johnson told Kastens he would "beat his ass" and that he would make sure Kastens never returned to his job at Spirit. (Tr. 159:3-8, 209:2-10) Numerous witnesses testified, however, that Johnson never made any such threats, and that neither Johnson nor any other Union official ever used any profanity toward Kastens. (Tr. 306:3-7 404:7-13, 412:2-5, 422:8-10, 425:19-24,

446:13-17, Tr. 434:12-22) Johnson never touched Kastens. (Tr. 189:17-22) Kastens tacitly admitted on cross-examination that he was not subjected to any threats by Johnson as the Charging Party did not regard his acts at that time as "the acts of a person who is in fear of being physically harmed or beaten up." (Tr. 202:16-20)

The testimony of Kastens and several other witnesses established that Spirit security personnel soon arrived at the location of the incident and directed Kastens and Cronk, who were not authorized to be on Company property, to leave the premises. Kastens testified as follows:

> Q Okay, and at any time, did Security come while you were there?
> A Yes.
> Q And what happened when Security came?
> A Security came and calmed down the situation, and then escorted Jay and I -- Jay Cronk and I from the facility.

(Tr. 160:4-10, 421:20-422:4, 432:22-25)

Kastens admitted that he was removed because he was not authorized to conduct any activities in that area. (Tr. 188:4-7) But Cronk falsely denied that he was directed to leave the area by security agents:

> Q Okay, I just wanted you to reflect and to the best recollection, is it your testimony and I want to be clear about this, but you were not asked to leave or escorted away by Security.
> A That is correct. Security did show up and they indicated where we could stand, as long as we stood on the sidewalk below the light posts, we were okay, as long as we didn't interfere with the comings and goings of the employees.
> Q And is it accurate to say that you were told by Security that you were in an unauthorized location?
> A That is incorrect.
> Q That's incorrect?
> A Yes.
> Q Okay, so you were not moved in any way, shape, or form by Security that day?
> A No.

(Tr. 210:18-211:9)

After being removed from the area by security personnel, Kastens allegedly called the U.S. Department of Labor to report these events. (Tr. 191:17-20) He did not contact the police or submit any type of report, and neither he nor Cronk reported to Spirit security that any threats were made against them by Johnson or anyone else. (Tr. 192:21-193:4, 476:23-477:1, 211:11-19) Indeed, the Spirit security officer who arrived at the scene stated that "there was no [incident] report needed at that time" because "[t]here was basically nothing to report." (Tr. 475:1-8)

After the events of April 11, 2014, Kastens publicly threatened Howard Johnson on Facebook. (Tr. 193:21-194:11) Specifically, on May 1, 2014, Kastens posted the following on his Facebook page:

> I would break his [Johnson's] hip it if made it that far. Better to have the paperwork watching my ass. I have my conceal carry. I'm not worried about him.

(Resp. Ex. 2)

Kastens also posted a comment on Facebook that he was pushing his (Johnson's) removal from office more than anything. (*Id.*) Kastens admitted on cross-examination that he is seeking to have Johnson removed from office because he wants to take Johnson's official position with the Union. (Tr. 535:1-8)

Argument and Authorities

In the amended complaint, the General Counsel alleges that the Union violated the Act (1) by attempting to cause and causing the Company to investigate, discipline and eventually discharge Kastens and Lehman because of their so-called dissident union activity; (2) by threatening Kastens with bodily injury and threatening to discriminatorily process his discharge grievance because of his dissident union activity; and (3) by refusing to process to arbitration grievances filed by Kastens regarding his multiple suspensions and discharge by reason of his dissident union activity. (GC Ex. 1-P at 3-4) Each of these allegations relates to the duty owed

by a labor organization to fairly represent the members of its bargaining unit.

As explained below, the General Counsel carries a heavy burden of proof to show that Respondents breached their duty of fair representation. Respondents filed a motion to dismiss the amended complaint when the General Counsel rested his case-in-chief because he failed to make a prima facie case for any of the alleged violations. Even assuming for the purpose of argument that a prima facie case was established for one or more alleged statutory violations, the Union introduced abundant evidence demonstrating that no violations had occurred. The Union did not breach its duty of fair representation and did not threaten or cause any injury to Kastens or Lehman.

I. Duty of Fair Representation

As the exclusive bargaining representative of all employees covered by its collective bargaining agreement, a labor union owes a duty to represent each unit employee fairly and in good faith. As the U.S. Supreme Court explained in the seminal case of *Vaca v. Sipes*: "The exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." 386 U.S. 171, 177 (1967). *Accord Boilermakers Local 202 (Henders Boiler and Tank Company),* 300 NLRB 28 (1990).

The burden to prove a breach of the duty of fair representation, and a violation of Section 8(b) of the NLRA, is quite demanding. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca,* 386 U.S. 171, 190 (1967); *see also Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991) (recognizing that this standard applies to all union

activity); *Mine Workers Dist. 5 (Pennsylvania Mines)*, 317 NLRB 663, 668 (1995). A showing of intentional misconduct is required; it is now axiomatic that mere negligence, the exercise of poor judgment, or ineptitude on the part of the union is insufficient to support a finding of arbitrary conduct. *Air Line Pilots Assn.*, 499 U.S. at 67.

"In its role as the exclusive agent for all employees in the bargaining unit, the union has the power to sift out frivolous grievances, to abandon processing of a grievance which it determines in good faith to be meritless, and to settle disputes with the employer short of arbitration." *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971). Hence the duty of fair representation does not require that a union fully pursue every grievance filed. *See Vaca,* 386 U.S. at 191-92 ("If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined.") In other words, an employee has no absolute right to insist that his grievance be taken to a certain level; a "union may screen grievances and press only those that it concludes will justify the expense and time involved in terms of benefitting the membership at large." *Thompson v. Aluminum Co. of America*, 276 F.3d 651, 658 (4th Cir. 2002) (internal citations omitted).

In considering duty of fair representation cases, the Board and courts generally give significant deference to the decisions made by unions and their officers and representatives, as "unions must be allowed a 'wide range of reasonableness' in serving their constituencies, including grievance handling." *Amalgamated Transit Union Div. 822 & German Trujillo, an Individual*, 305 NLRB 946, 953 (1991) (internal citations omitted). This wide range of reasonableness allows for union representatives to pursue their own strategy and to use their professional judgment in determining which grievances have merit and the most effective way to

process each grievance. A union representative's failure to address an issue in the manner proposed by a unit member amounts to a mere disagreement about strategy, which is not sufficient to show a breach of the duty of fair representation. *Johnson v. United Steelworkers of Am., Dist. 7, Local Union No. 2378-B,* 843 F. Supp. 944, 948 (M.D. Pa. 1994) *aff'd,* 37 F.3d 1487 (3d Cir. 1994).

An examination of alleged discrimination in the context of the duty of fair representation "requires inquiry into the subjective motivation behind union action." *Trnka v. Auto Workers*, 30 F.3d 60, 63 (7th Cir. 1994). Accordingly, the General Counsel's case "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Transit Union v. Lockridge*, 403 U.S. 274, 301 (1971). Not every act of disparate treatment or negligent conduct is proscribed, but only those acts which are motivated by hostile, invidious, irrelevant, or unfair considerations. *Steelworkers Local 2869 (Kaiser Steel Corp.),* 239 NLRB 982, 982 (1978).

II. The General Counsel Failed to Make a Prima Facie Showing of Any Statutory Violations Regarding the Investigation and Discharge of the Charging Parties

In the amended complaint, the General Counsel alleges that Respondents requested Spirit to investigate the actions of Ryan Kastens and Jarrod Lehman, including their distribution of the accident video, and that by this conduct the Union attempted to cause and caused the employer to discipline, suspend or discharge the Charging Parties. (GC Ex. 1-P at 3) The General Counsel asserts that the Union committed these allegedly discriminatory acts because Kastens and Lehman had engaged in dissident union activity. (GC Ex. 1-P at 3)

The General Counsel claims that by these alleged actions against Kastens and Lehman, Respondents violated Sections 8(b)(1)(A) and 8(b)(2) of the Act. (GC Ex. 1-P at 4) Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization to restrain or

coerce employees in the exercise of the rights guaranteed in Section 7. 29 U.S.C. § 158(b)(1)(A). And Section 8(b)(2) provides in relevant part that it shall be an unfair labor practice for a union

> to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id. § 158(b)(2).

A. Applicable Standards

Regarding alleged violations of Section 8(b)(2), the Board employs the standard established in *Wright Line*, 251 NLRB 1083 (1980), in allocating the burdens of proof. *See Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). In *Ironworkers Local 340 (Consumers Energy Co.),* the Board held:

> To establish a prima facie case under *Wright Line*, the General Counsel must establish that [the employee's] . . . protected concerted activity was a substantial or motivating factor in the Respondent's adverse employment actions . . . If the General Counsel makes the required initial showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have taken the same action even in the absence of [the employee's] protected activity.

347 NLRB 578, 579 (2006) (describing the *Wright Line* standard, then applying it to an 8(b)(2) case).

Therefore, in order to make a prima facie showing that Respondents violated Section 8(b)(2) by causing or attempting to cause the Company to discriminate against Kastens and Lehman through a request that they be investigated for distributing the confidential security video, the General Counsel must prove that the Union requested Spirit to investigate or discipline the Charging Parties, and that their union activity was a substantial or motivating factor in Respondents' decision to request an investigation or disciplinary action. Proof that the Charging Parties' union activities were a substantial or motivating factor necessarily requires some

showing that they had engaged in protected activity, and that Union officials were aware of such protected activity.

The General Counsel has also argued that the Union violated Section 8(b)(1)(A). For alleged violations of Section 8(b)(1)(A), the Board has described the prima facie standard as follows: "Analogizing to an 8(a)(3) violation when an employer discharges an employee because of union activity, a prima facie case can be established by proof of protected activity, employer knowledge of that activity, and employer animus toward the union. *Machinists Dist. 751 (Boeing Co.),* 270 NLRB 1059, 1065 (1984) (defining and applying standard to union's alleged violation of 8(b)(1)(A) for refusing to process a discharge grievance). *Compare Associated Milk Producers,* 259 NLRB 1033, 1035 (1982) ("The elements of protected activity on the part of the discharged employee, employer knowledge of the protected activity, and employer animus toward the Union, taken together, are sufficient to establish a prima facie case of unlawful discharge.").

In cases such as this, which turn on the question of improper motivation for a respondent's action, the General Counsel is required to make a prima facie showing sufficient to support the inference that the protected conduct was "a motivating factor" in causing that action. *Machinists Dist. 751* (*Boeing Co.*), 270 NLRB at 1066. Accordingly, similar to the prima facie case necessary to establish an alleged Section 8(b)(2) violation, a prima facie case of a Section 8(b)(1)(A) violation requires a showing that the Charging Parties were engaged in protected activity; the Union was aware of that protected activity; and that sufficient evidence of a discriminatory animus existed to infer that the protected activity was a motivating factor underlying the allegedly unlawful acts. The General Counsel has failed to establish a prima facie case for either alleged violation.

B. The Union Never Requested the Company to Investigate, Discipline or Discharge Kastens and Lehman

The General Counsel failed to introduce any evidence proving that any Union representative requested that Kastens or Lehman be investigated or disciplined for widely disseminating the Company's security video. The General Counsel's entire argument that such a request was made centers on a single e-mail from Howard Johnson to Jeff Black, Spirit's Senior Manager of Labor Relations, dated January 27, 2014, in which Johnson forwarded an e-mail he had received from Becky Ledbetter. Johnson asked Black the following:

> We were told that this video shouldn't have been released….im getting calls about this, people are forwarding this message internally as well as outside spirit. What is the deal with this video?

(GC Ex. 8 at 2)[1] The General Counsel has never alleged or suggested that any other statements, questions or requests by a Union official or representative constituted an attempt by the Union to cause Spirit to investigate the Charging Parties for disseminating the security video, and there is no evidence whatsoever of any such request.

In the e-mail in question, Johnson asked only why the video was circulating. He made no reference to either Kastens or Lehman, and he made no request for an investigation or discipline regarding those individuals. Johnson testified that he was looking for an explanation as to why the video was being circulated in the plant. At the request of Ledbetter and various unit employees in maintenance, Johnson attempted only to determine "how did this get out." (Tr. 291:4-5) The General Counsel offered no evidence that Johnson's e-mail inquiry constituted a request for an investigation of the Charging Parties.

[1] The e-mail from Johnson to Black was reproduced as part of a purported chain of e-mails in the Company's security investigation report, which was offered as GC Ex. 8. The General Counsel also offered the purported e-mail chain, which included multiple forwards of Johnson's message, but it was never authenticated or received in evidence. The purported chain was of highly questionable origin and appeared to include one or more e-mails that were copied and pasted in the document. *See* GC Ex. 21 (rejected).

In order to prove that a union violated Section 8(b)(2) by requesting that the employer terminate an employee, there must be actual evidence of the union's effort to have the employer remove the employee. *George Williams Sheet Metal Co.*, 201 NLRB 1050, 1055 (1973) (no violation where union did not endorse employee's removal, but simply relayed to employer that other employees had stated that they would quit if employee was not removed from job). Here, Johnson never endorsed the removal of either Kastens or Lehman. He never even mentioned them by name. He was merely relaying the concerns of his unit members to the Company and requesting an explanation.

No management representative testified that Spirit interpreted Johnson's e-mail as a request to investigate or discipline the Charging Parties. And there is no evidence that Spirit initiated an investigation of Kastens and Lehman because of the e-mail. Jeff Black was the recipient of Johnson's e-mail, and Lisa Atcheson was the Security Supervisor when the Charging Parties were investigated and discharged. Yet the General Counsel did not call either Black or Atcheson to testify. Indeed, the General Counsel presented no testimonial or documentary evidence as to why Spirit initiated its investigation of the Charging Parties. This gap in the evidence is fatal to the General Counsel's case.

Further, the amended complaint alleges that the Union requested the Company to investigate Kastens and Lehman, and that this request caused them to be discharged. If the General Counsel believed that the Spirit managers who received Johnson's communication or who initiated an investigation would confirm its theory that the Company viewed Johnson's e-mail as a request to investigate Kastens and Lehman, then the General Counsel should have called them to testify on this matter. The Administrative Law Judge may draw an adverse inference when a party fails to call a witness reasonably assumed to be favorably disposed

toward that party. *See Advocate South Suburban Hospital v NLRB*, 468 F.3d 1038, 1048 and n.8 (7th Cir. 2006). Because of this failure to present witnesses, the Administrative Law Judge should infer that any Spirit officer or manager with direct knowledge of the matter would have testified that no Union official requested an investigation; that the Company did not interpret Johnson's e-mail as such a request; and that the Company did not discipline or discharge the Charging Parties because of any actions taken by the Union.

Johnson testified, without contradiction, he was not aware that Lehman and Kastens had originated the lengthy e-mail chain when Johnson forwarded the chain to Black:

> Q At the time that you sent the video to Mr. Black did you know the source of the video?
> A The source of the video?
> Q Yeah.
> A No. Huh-uh. I didn't know nothing, no.
> Q Okay. So you didn't know that the video came from Ryan Kastens or Jarrod Lehman?
> A You know, I don't know the cause of that. I don't remember that. I mean I really don't. I mean I was more concerned of it being out, you know, than anything because, you know, after that happened I had a lot of maintenance guys call me. And everybody has called me and asked of me what's this doing out?

(Tr. 292: 11-23; Tr. 296:9-21) Johnson's inquiry to Black to allay the concerns of numerous maintenance employees about the video cannot be reasonably to request an investigation or discipline of the Charging Parties since Johnson was not aware that they had any role in disseminating the video at that time.

The General Counsel may argue that Johnson would have scrolled down and reviewed the entire e-mail chain to determine the original source and it should be inferred that Johnson knew Lehman and Kastens had originated the video. But any argument for such an inference is undermined by the Charging Parties' own statements. When Spirit security investigators interviewed Kastens on February 25, 2014, he signed a statement addressing his role in

disclosing the confidential security video. GC Ex. 2. Kastens stated: "I do not remember who sent me the e-mail. Someone told me it was Jarrod Lehman that sent me the e-mail. I don't know who sent it… After viewing the e-mail, I forwarded the e-mail to other employees." *Id*. Lehman testified that the e-mail had been forwarded to him, but that he did not know who forwarded it. (Tr. 249:16-19) This explanations of both Kastens and Lehman is the same as Johnson's explanation: he opened the e-mail, viewed the attached video, and then forwarded it without knowing the video's original source. The General Counsel cannot reasonably question Johnson's credibility on this subject when the Charging Parties testified they had forwarded the video to numerous individuals without determining the original source.

Counsel for the General Counsel suggested at hearing that Frank Molina, President of District 70, may have attempted to cause Spirit to discharge Lehman when he provided Jeff Clark with electronic copies of Facebook posts during the investigation of Lehman. (Tr. 67:5-73:12) The evidence relevant to this murky allegation is included entirely in GC Ex. 14, a one-page chain of e-mails between Molina and Clark in February 2014. In that exchange, Molina first forwarded to Clark a message titled *Facebook* which he received from Lynne Strickland. (GC Ex. 14) Clark then responded that he had shredded the hard copies of images that were presumably attached to Molina's e-mail before realizing that not all the images he had requested were included, and he asked for an electronic version of "the selfie from the shop." (GC Ex. 14) Clark subsequently sent another e-mail to Molina requesting the same document. (GC Ex. 14) It was not clear whether Molina ever actually sent the *selfie* which Clark requested.

Molina explained at hearing that this exchange took place after he met with Clark in Molina's office during the Company's investigation of Lehman and Kastens and during the Union's grievance investigations. (Tr. 67:5-69:19) At that time, Clark already possessed a hard

copy of these images and messages that the Charging Parties had posted to Facebook, which Molina had also reviewed during his own investigation. (Tr. 69:13-19) Clark observed during the meeting that Molina had higher-quality copies of the same images and asked the Union official to provide better copies to him, including the photo Lehman had taken of himself on the shop floor. (Tr. 69:13-19; GC Ex. 11)

Molina did not provide Clark with any new information or documents relating to Lehman as the Company was already in possession of the Facebook posts and images. Molina never called Clark's attention to new evidence against Lehman, and he never attempted to cause the Company to discharge or discriminate against Lehman. Molina's explanation was reasonable and truthful. The Counsel for the General Counsel did not call Clark to testify but rather accepted Molina's testimony. Accordingly, the Administrative Law Judge should infer that Clark's testimony would have been adverse to the General Counsel's case.

In nay event, in the amended complaint alleges only that the Union Spirit to investigate Kastens and Lehman regarding the security video. There is no allegation that the Union violated Sections 8(b) by providing the Company with a higher-quality copy of documents that it already possessed. (GC Ex. 1-P at 3) Molina's conduct in this respect caused no harm to Lehman and did not violate Section 8(b)(1)(A) or 8(b)(2).

C. The Union's Inquiry Regarding the Confidential Security Video Was not Motivated by the Charging Parties' Union Activity

The General Counsel failed to present sufficient evidence that Kastens and Lehman's union activity was a substantial or motivating factor in Respondents' inquiry concerning the confidential security video. In this connection, to make a prima facie showing of the substantial or motivating factor prong under Section 8(b)(1)(A) or 8(b)(2), the General Counsel first must show that Lehman and Kastens were involved in protected activity, and that Howard Johnson –

as the sole Union official who allegedly attempted to cause the Company to discriminate against Lehman and Kastens – was aware of that activity. *See Machinists Dist. 751 (Boeing Co.),* 270 NLRB at 1065. The General Counsel then must demonstrate that Union officials harbored an animus against the Charging Parties because of their protected activity to support an inference of causation between the protected activity and the Union's actions. *Id.*

1. Jarrod Lehman

The amended complaint is woefully deficient with respect to the motivating factor underlying the Union's alleged discriminatory animus toward Lehman. In this regard, Lehman never identified himself to Molina as a supporter of Jay Cronk in the 2014 election conducted by The Grand Lodge and there is no evidence that Lehman supported Cronk. (Tr. 96:15-22) Based on Counsel for the General Counsel's direct examination of Lehman, the General Counsel apparently asserts that Howard Johnson was motivated to seek Lehman's discharge in January 2014 because Lehman opposed Johnson in an election for the position of In-Plant Representative in mid-2013. (Tr. 236:1-24) Lehman's testimony that he opposed Johnson in that election is sufficient to show he was engaged in protected activity under Section 7 and that Johnson was aware of that activity. *See Sheet Metal Workers Local 16 (Parker Sheet Metal),* 275 NLRB 867 (1985).

However, the General Counsel failed to show that such protected activity was a substantial or motivating factor behind Johnson's 2014 e-mail to Jeff Clark because there is no evidence that Johnson held any animus toward Lehman. Johnson's testimony that he had no animosity or ill will toward Lehman in January 2014 was not rebutted. (Tr. 309:5-7)

In the absence of direct evidence of discriminatory animus, inferences of animus or discriminatory motives may be drawn from circumstantial evidence and the record as a whole. *See Fluor Daniel, Inc.*, 304 NLRB 970 (1991). But Counsel for the General Counsel presented no circumstantial evidence indicating that Johnson or any other Union official harbored an

animus against Lehman based on his past union activity. The totality of the facts and circumstances support a contrary finding. The local election involving Lehman and Johnson was not contentious or even hotly contested; instead, it is undisputed that Johnson won the election by a large margin. (Tr. 236:20-24) The election had concluded months before Johnson's 2014 e-mail to Clark regarding the security video. (Tr. 309:5-7)

Moreover, when Steve Rooney (former President of District 70) discharged Lehman from his Union position, "Howard Johnson . . . back then helped him get his job back." (Tr. 103:1-7) Molina hired Lehman as a Joint Partnership Advocate because of Johnson's efforts after Rooney had discharged Lehman. (Tr. 103:1-7, 124:17-21) And Lehman testified that at the conclusion of the discharge grievance process, he thanked Molina for his diligent efforts in pursuing the grievance. (Tr. 267:10-268:1) Molina even encouraged him to run for political office. *Id.*

This evidence does not reflect any animosity or discriminatory bias by any Union official against Lehman, and there is no contrary evidence in the record.[2] The General Counsel has not made a prima facie showing that Lehman's protected activity was a substantial or motivating factor in Johnson's decision to submit an e-mail inquiry concerning the security video.

2. Ryan Kastens

The General Counsel contends that Howard Johnson was motivated to seek an investigation of Kastens because he supported Jay Cronk's slate of candidates in the election for International Union officers. (Tr. 312:23-313:5) Kastens's expressed opposition to incumbent Grand Lodge officers qualifies as protected activity. *See, e.g., Sheet Metal Workers*, 275 NLRB 867. But there is no probative evidence that Johnson was aware of Kastens's political views in

[2] Even if the Administrative Law Judge finds that Johnson and Lehman disliked each other, Lehman admitted that any bad feelings existed before Lehman ran for office in 2013 and that any deterioration in their relationship took place before Lehman ran against Johnson. (Tr. 247:23-248:15) Accordingly, even if animus existed between the two individuals, it was not a *discriminatory* animus sufficient to support an inference that Johnson took any action against Lehman because of his union activity.

January 2014. Certainly Johnson knew that Kastens supported Cronk on April 11, 2014, the day before members voted in Wichita (Tr. 312:23-313:5). But Counsel for the General Counsel presented no testimonial or documentary evidence that Johnson knew or should have known of Kastens's support for Cronk in January 2014. There is no evidence whatsoever that Kastens had expressed any support for Cronk in Johnson's presence or that Johnson had received any reports of such support prior to January. The General Counsel's prima facie case fails on that prong.

Further, the General Counsel failed to prove that Johnson harbored any discriminatory animus as a result of Kastens's support of Cronk which could reasonably support an inference that such protected activity was a substantial or motivating factor in Johnson's decision to forward the e-mail and video to Clark. Johnson testified that he held no animosity or ill will against Kastens in January 2014. (Tr. 309:8-10) And previously, before forwarding the e-mail and attached security video to Clark in January 2014, Johnson had intervened on two separate occasions to save Kastens's job by keeping potential disciplinary actions off his record. (Tr. 299:20-300:4; 309:21-310:12) It would be understandable if Johnson did not regard Kastens as friendly after the Charging Party verbally assaulted him on April 11, 2014. But there is no credible evidence, either direct or circumstantial, that Johnson was motivated by Kastens's union activity when he inquired about the security video two months earlier.

D. The Union Did Not Cause or Attempt to Cause Spirit to Discriminate Against the Charging Parties

A violation of Section 8(b)(2) of the Act cannot be found unless the Union caused or attempted to cause the employer to discriminate against the Charging Parties in violation of Section 8(a)(3). 29 U.S.C. § 158(b)(2).[3] Based on the statutory language, "a union does not

[3] Section 8(b)(2) also establishes that it is unlawful for a labor union to cause the employer "to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees

violate 8(b)(2) unless the 'discrimination' which it seeks would constitute a violation of 8(a)(3) if the employer acted without suggestion or compulsion." *NLRB v. Local 50, Am. Bakery & Confectionery Workers Union, AFL-CIO*, 339 F.2d 324, 327 (2d Cir. 1964) (*cert. denied*) (citing *NLRB v. Local 294, IBT*, 317 F.2d 746 (2d Cir. 1963); *NLRB v. Local 776, IATSE* (*Film Editors*), 303 F.2d 513, 516 (9th Cir. 1962)). *See also Palmer House Hilton & Mohamad Safavi Unite Here*, 353 NLRB 851, 860 (2009).

In this case, even if the Union had made a request that Spirit investigate or discipline the Charging Parties for circulating the security video – which was not proven by the General Counsel – this would not constitute an attempt to cause the Company to discriminate against the employees in violation of the Act. Rather, this would constitute a request that the Company conduct an investigation into a disclosure of confidential information that impacted other unit employees in the maintenance department. If the Company -- acting without suggestion or compulsion -- investigated the disclosure and dissemination of the accident video, determined that Kastens and Lehman committed an offense warranting termination, then subsequently discharged them, this would not indicate in any way that the Company violated Section 8(a)(3) of the Act.

In this connection, the Board has determined that Spirit did not violate the Act when it suspended and discharged Kastens for his misconduct in using company resources to disseminate the video. On July 18, 2014 – the date on which Kastens filed his original unfair labor practice charge against the Union -- he also filed an unfair labor practice charge against the employer. It

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uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(b)(2). That prohibition is inapposite in this case as both Charging Parties remained members of Local Lodge 839 throughout their entire employment with Spirit. (Tr. 126:10-127:3; Tr. 233:15-19) The Union never denied or terminated either Charging Party's membership for any reason prior to their terminations so such actions could not have caused the Company to discriminate against either individual. Accordingly, the only possible basis for a Section 8(b)(2) violation is an attempt to cause the employer to violate Section 8(a)(3) as it relates to the Charging Parties' rights.

is clear that Kastens alleged a violation of Section 8(a)(1) and (3): "On February 13 and March 5, 2014, the Employer discriminated against employee Ryan Kastens by suspending him and terminating his employment in order to discourage union activities or membership." (Resp. Ex. 14) The events forming the basis of that charge are the same events forming the basis of Kastens's charge against the Union. The Regional Director of Region 14 dismissed the charge against Spirit. (Tr. 542:22-543:3) The parties stipulated at hearing that Kastens's appeal of that charge has been denied. (Tr. 543:6-10)

Therefore, the Board found that Spirit did not violate Section 8(a)(3) when it investigated, suspended and discharged Kastens, and that would be the case whether or not the Company acted on the suggestion or compulsion of the Union. Spirit acted lawfully because, as discussed in detail *infra* at Section IV.B.2, the Company had good cause to discharge both Charging Parties for severe misconduct. Because the Company's actions would not have constituted discrimination against Kastens or Lehman in violation of Section 8(a)(3) if those actions had been taken without any suggestion by the Union, they therefore cannot form the basis of a Section 8(b)(2) violation by the Union. *See Local 50, Am. Bakery & Confectionery Workers Union, AFL-CIO*, 339 F.2d at 327.

E. The Union Would Have Taken the Same Actions Absent the Charging Parties' Union Activity

If the General Counsel establishes a prima facie case in his case-in-chief, the burden then shifts to Respondents to prove, as an affirmative defense, that they would have taken the same action even in the absence of the employees' protected activity. *Ironworkers Local 340* (*Consumers Energy Co.*), 347 NLRB at 579; *see also Manno Electric*, 321 NLRB 278, 280 fn. 12 (1980). As shown above, the General Counsel did not make a prima facie case with respect to any violation of Section 8(b)(1)(A) or 8(b)(2) based on the Union's alleged request that Spirit

investigate the Charging Parties for their dissemination of the accident video. But even if a prima facie case were made, it was conclusively rebutted by the Union's evidence.

In this regard, Howard Johnson was not aware that Kastens or Lehman had been involved in circulating the video when he forwarded it to Jeff Black, so there is no question that he would have taken this action without regard to whether the Charging Parties' union activity. (Tr. 292: 11-23; Tr. 296:9-21)

Further, the General Counsel is required to prove "discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Transit Union v. Lockridge*, 403 U.S. at 301. There is no such proof. To the contrary, the evidence demonstrates that the Union had several legitimate reasons to contact the Company and inquire about the widespread circulation of the confidential video and to request that the video be removed from the shop floor in addressing the concerns of numerous maintenance employees who had contacted Becky Ledbetter and Johnson. The Union would have taken the same actions whether or not the persons responsible for circulating the security video were engaged in protected activity

It is well-established that a labor organization has a statutory duty to fairly represent all employees in its bargaining unit. *Vaca*, 386 U.S. at 177 (emphasis added). In *O'Neill v. Airline Pilots Ass'n, Int'l*, the Fifth Circuit explained that because a union must consider all employees in a unit rather than a select few, it is inevitable that some employees may not benefit when the entire unit, or a large number of unit employees, benefits:

> [E]ven if ALPA sacrificed benefits to the retired pilots for the greater good of the entire union membership, this choice will not support an inference of a bad faith breach of ALPA's DFR. In negotiating conflicts such as the one ALPA faced with Continental, some groups within the union will always fare better than others. Arriving at a compromise that includes disparate benefits for various groups is not per se outside ALPA's discretion or the "wide range of reasonableness," *see Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953), to which it is entitled as the pilots' duly chosen bargaining representative.

939 F.2d 1199, 1204 (5th Cir. 1991), on remand, 499 U.S. 65 (1991).

For this reason, consideration of the Union's duty of fair representation in this case must take into account the fact that numerous unit employees were affected by disclosure of the confidential security video. Both Ledbetter and Johnson testified that they received numerous phone calls from maintenance employees who had received or viewed the video and wanted to know why it was being circulated because security videos had never been released previously to employees in the plant. (Tr. 335:17-24; 290:21-291:3) The immediate objective of both Union officials was to remove the security video from computers on the shop floor because of the concerns expressed by unit employees. (Tr. 290:21-292:3, 338:6-9, 343:2-23) Their testimony was clear, direct and unequivocal. *See id.*

"To determine whether a union has violated Section 8(b)(2), the 'true purpose' or 'real motive' behind the union's actions should be ascertained." *NLRB v. Int'l Bhd. of Elec. Workers, Local 952*, 758 F.2d 436, 440 (9th Cir. 1985) (internal citations omitted). The Union's "true purpose" in this case was a transparent effort to protect Reggie Maloney and other maintenance employees by having the accident video removed from circulation.

Ledbetter was especially concerned about Maloney, who had a serious medical condition. Upon viewing the video it was clear to Maloney that the accident involved a Spirit scooter, and he soon learned that Roger White, a co-worker, was the driver of the scooter. (Tr. 389:21-390:16) White had been severely injured in the accident. *Id.* Maloney was also concerned whether a video of a previous accident that involved him while he driving a Spirit scooter would also be widely circulated in Spirit's e-mail system. (Tr. 392:21-393:9) The Union certainly had a duty to protect White and Maloney and other maintenance employees from embarrassment and

other adverse consequences resulting from widespread disclosure of accidents and injuries shown in surveillance videos.

Moreover, any unit employee who viewed and then forwarded the confidential video to persons outside Spirit would have violated the same company policies that Lehman and Kastens violated, whether knowingly or not. By seeking to have the video removed from the e-mail servers and the shop floor, the Union protected and acted in the best interests of a large number of affected unit employees.

The Union's representatives were also concerned about the safety and well-being of unit employees. After Ledbetter viewed the accident video, her immediate response was to forward the e-mail and video to Kenneth Tullis, who was the Union's First Shift Full-Time Safety Focal. (Resp. Ex. 12; Tr. 334:12-25) In that capacity, Tullis was responsible for all matters relating to safety, accidents and injuries throughout the entire plant. (Tr. 335:1-3) Ledbetter asked Tullis to call her to discuss the video. (Resp. Ex. 12) This plainly demonstrates that Ledbetter, who also asked Johnson to take action to remove the video from the plant, was motivated by the legitimate concern of health and safety of unit employees such as White.

The Union certainly had legitimate reasons for contacting the Company and inquiring about the security video in order to protect the rights and interests of their members. Ledbetter and Johnson would have been derelict in their duty to the unit if they had refused to address the concerns of the maintenance employees. Their actions were taken "for the greater good of the entire union membership," and therefore did not constitute a violation of the Union's duty of fair representation. *Airline Pilots Ass'n, Int'l*, 939 F.2d at 1204. Thus, the Union introduced abundant evidence of legitimate, non-discriminatory reasons for inquiring about the video that rebutted the allegations in the amended complaint.

F. The Company's Discovery of the Charging Parties' Misconduct Was Inevitable Under Any Circumstances

Further, the magnitude of the Charging Parties' repeated violations of Spirit's internet and e-mail policies mandates a finding that the employer would inevitably have discovered the e-mails and investigated both Lehman and Kastens under any circumstances. On January 27, 2014, Lehman sent an e-mail and attached video to nine different e-mail addresses, two of which were directed to individuals outside of Spirit's electronic mail system. (GC Ex. 8 at 5) That same day, Kastens forwarded the message to approximately 71 separate e-mail accounts, eleven of which were directed to persons outside the Spirit e-mail system. (GC Ex. 8 at 3-6; Tr. 194:20-195:6) It is, of course, highly probable that recipients who were not employees of Spirit forwarded the e-mail and video to many others. And as Reggie Maloney testified, he viewed the video on Spirit computers in multiple locations in the plant even though neither Lehman nor Kastens had forwarded the video to hm. (Tr. 386:18-387:24, 388:15-389:1; GC Ex. 8 at 3-6)

Due to the scale of the Charging Parties' egregious violations of company policies and the public nature of the video's disclosure, Spirit management certainly would have become aware that the video had been disclosed and circulated at some point on or soon after January 27, 2014. The General Counsel failed to prove that Howard Johnson's inquiry was management's first knowledge of the e-mail chain and video. Assuming for the purpose of argument that Johnson's e-mail to Jeff Black was the first occasion on which the video was brought to management's attention, there is no question that the Company would have discovered the e-mail chain that was initiated by Lehman and Kastens, performed an investigation, and eventually discharged both Charging Parties.

III. The Union Did Not Threaten to Interfere with Kastens's Employment Rights or to Discriminatorily Process His Grievances

The amended complaint alleges that Respondents violated Section 8(b)(1)(A) of the Act on April 11, 2014 when Howard Johnson "[t]hreatened employees with bodily injury because they engaged in dissident union activity" and "[t]hreatened to discriminatorily process employees' grievance and to impede employees' efforts to obtain reinstatement through the grievance process . . . because they engaged in dissident union activity." (GC Ex. 1-P at 3-4) In this connection, the Board has held that threats of physical violence by union agents against members or employees can be coercive within the meaning of Section 8(b)(1)(A) and therefore prohibited by the Act. *Food & Commercial Workers Local 7R (Longmont Foods*), 347 NLRB 1016 (2006). But such threats constitute a statutory violation only if they are in response to or otherwise related to an employee who is exercising his rights under Section 7. *See, e.g., Oil Workers Local 2-947 (Cotter Corp.),* 270 NLRB 1311 (1984) (the employee's "reference to filing a new charge provoked [union official] Wilkins into threatening him with physical violence. There is no other reasonable explanation for Wilkins' action. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) of the Act by engaging in such conduct."); *In re Local 446, Int'l Bhd. of Painters & Allied Trades, AFL-CIO*, 332 NLRB 445, 446 (2000) (Section 8(b)(1)(A) proscribes threats of economic reprisals and physical violence by unions against employees when those threats are made against employees because of their protected challenges to incumbent union leadership).

Accordingly, in order to prove a violation of Section 8(b)(1)(A) based on threats allegedly made by Johnson against Ryan Kastens, the General Counsel must present evidence showing (1) that threats were made and (2) that they were in response to, provoked by or

otherwise related to Kasten's protected activity, thereby showing the requisite animus against the Charging Party. The General Counsel failed to prove either prong here.

A. Johnson Did Not Threaten Kastens

The General Counsel did not satisfy his burden of proving by a preponderance of the evidence that any threat was ever made against Kastens. There is no probative documentary evidence reflecting a threat of violence or a threat to discriminatorily process Kastens's grievances. The only purported evidence of any threats is the testimony of Kastens and Jay Cronk. Kastens alleged that on April 11, 2014:

> He [Johnson] proceeded to clinch his fist, turned to me and say, "Shut up before I beat your ass," and then proceeded to inform me that I was never going to be anything in this Union, and he was going to see to it that I didn't get my job back.

(Tr. 159:3-8) Cronk alleged:

> Q And did you witness any of those individuals communicating with Mr. Kastens?
> A Yes, the individual that was referred to as HoJo, specifically, and I guess most prominently, was directing comments at Mr. Kastens, telling him that he was dead here, the Union wouldn't do anything for him anymore. Basically, saying he was going to kick his ass, but in a lot worse language than that. Very vile, very vulgar, and very threateningly.

(Tr. 210:2-10) The General Counsel's entire case regarding this alleged violation of Section 8(b)(1)(A) is based on these two self-serving allegations. They are not sufficient to prove that any threat was actually made against Kastens.

When an allegation of fact is disputed and the only evidence relating to the allegation is testimonial, the Administrative Law Judge's determination will turn on the credibility of the witnesses. As the Board stated in *Standard Parking*:

> A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective

> evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole.

360 NLRB No. 132 (June 25, 2014) (citing *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 12 (2012), *enf'd.*, 734 F.3d 764 (8th Cir. 2013)).

None of these factors support a finding that Kastens and Cronk were credible. First, Kastens is an interested party who admittedly seeks to replace Johnson in his Union position. As discussed in Section V.A, *infra*, Kastens is motivated by hostility against Johnson. In a Facebook post he made soon after the April 11 incident, Kastens stated: "I'm pushing for his [Johnson's] removal from office more than anything." (Resp. Ex. 2) And Kastens admitted that he has made comments to others since that time expressing his efforts to have Johnson removed from office so that he can replace him. (Tr. 535:1-8) And, of course, Kastens was motivated by his determination to recover a substantial amount of money from the Union in this proceeding.

Kastens's demeanor at hearing also derogated from his credibility. Testimony is more likely to be credited when "witnesses were poised, forthright and composed when they testified." *Relco Locomotives*, 358 NLRB No. 37. Kastens was none of these. He spoke quietly and nervously, very rarely making eye contact with either counsel, the Administrative Law Judge, or anyone else present. Indeed, during Kastens's direct examination, Judge Rosas questioned whether Kastens was reading directly from documents that were placed on the stand in front of him, and Counsel for the General Counsel had to ask Kastens to change his posture and look at the attorney while the Charging Party testified. (Tr. 136:17-137:2)

The weight of the evidence also supports a finding that no threats were made against Kastens. The Union presented six credible witnesses who refuted Kasten's claim. In addition to Johnson, the Union presented five witnesses – Steve Elder, Juan Eldridge, Becky Ledbetter, Brent Allen, and Austin Ledbetter – each of whom personally witnessed the verbal exchange

between Kastens and Johnson on April 11. (Tr. 193:5-20) All testified that Kastens instigated the verbal confrontation and attempted to provoke Johnson during the incident. All six witnesses stated that Johnson never threatened Kastens with bodily harm and never threatened to interfere with his employment rights. (Tr. 306:3-7 404:7-13, 412:2-5, 422:8-10, 425:19-24, 446:13-17, 434:12-22) All of the Union's witnesses were poised and forthright. Their testimony was clear, direct, unequivocal, and free from contradiction.

Further, Security Officer Gerald Randolph testified that he was called to the area to look into the verbal confrontation. He testified that he did not see or hear any threats by Johnson against Kastens. Significantly, Randolph also confirmed that neither Kastens nor Cronk stated to him or anyone else that Kastens had been threatened by Johnson. (Tr. 475:1-14, 477:10-19) And neither Kastens nor Cronk reported any alleged threats to the Security Department at any time. (*Id*.)

Randolph escorted Kastens and Cronk off Company's property on April 11. It is noteworthy that Counsel for the General Counsel failed to present his testimony as it was the Union which called the security officer to testify. His testimony did not support Kastens' claim that he was threatened by Johnson. Nor did the General Counsel call any other security personnel or other employees who were in the area at the time in question. An adverse inference should be drawn against the General Counsel for failing to call any witnesses other than the Charging Party and Cronk. *Advocate South Suburban Hospital v NLRB*, 468 F.3d at 1048 and n.8.

Cronk's testimony certainly should not be credited. Kastens supported Cronk in his campaign for election to International President. Another important factor is that the Grand Lodge had discharged Cronk for gross misconduct; an arbitrator had recently upheld the

discharge in an award issued prior to the hearing. Hence Cronk was motivated to support Kastens's false version of the events that occurred on April 11.

Moreover, Cronk directly contradicted Kastens regarding one of the key facts. Kastens testified that "[s]ecurity came and calmed down the situation, and then escorted Jay and I – Jay Cronk and I from the facility" because Kastens and Cronk were not authorized be in that area. (Tr. 160:4-10, 188:4-7) But Cronk denied he had been removed by security personnel:

> Q Okay, I just wanted you to reflect and to the best recollection, is it your testimony and I want to be clear about this, but you were not asked to leave or escorted away by Security.
> A That is correct. Security did show up and they indicated where we could stand, as long as we stood on the sidewalk below the light posts, we were okay, as long as we didn't interfere with the comings and goings of the employees.
> Q And is it accurate to say that you were told by Security that you were in an unauthorized location?
> A That is incorrect.
> Q That's incorrect?
> A Yes.
> Q Okay, so you were not moved in any way, shape, or form by Security that day?
> A No.

(Tr. 210:18-211:9) This certainly shows that Cronk's testimony is not reliable or trustworthy.

The weakness of the General Counsel's case is revealed by his efforts to bootstrap Kastens's allegations with two irrelevant and misleading documents. The Administrative Law Judge admitted the documents in evidence over the strenuous objections of the Union's counsel. General Counsel Exhibit 4 is a *Petition for Protection from Stalking Order* filed by Kastens against Johnson in his individual capacity on April 14, 2014 in the Sedgwick County District Court, in which Kastens wrote that Johnson "balled up his fist and threatened to 'beat my ass'" on April 11. (GC Ex. 4 at 2-4) That exhibit also includes a Summons and Notice of Hearing for Protection Order with a blank Return of Service, which does not indicate that the document was

ever served on Johnson. (GC Ex. 4 at 1) General Counsel Exhibit 5 is a Final Order of Protection from Stalking, purportedly entered May 1, 2014, which states that Johnson may not follow, harass, contact, communicate with or come near Kastens until May 1, 2015. (GC Ex. 5 at 1) That order provides that the defendant, Johnson, failed to appear. (GC Ex. 5 at 1)

These two documents should be given absolutely no weight regarding the General Counsel's allegations that Johnson threatened to physically harm Kastens because of his union activity. First, Kastens's petition was filed against Johnson in his individual capacity, not against the Union, which is the Respondent in this case. (GC Ex. 4) The order indicates that Johnson did not appear for the hearing, so it is an ex parte ruling by a Kansas state judge. (GC Ex. 5) The General Counsel never questioned Johnson regarding the order or even asked whether he had received any notice of hearing. There is no indication that any investigation or fact-finding ever occurred before the final order was issued; instead, it appears that the entire order was based on Kastens's uncorroborated and self-serving allegations.

The only thing that these documents show is that three days after the events of April 11, 2014, Kastens went to the courthouse and claimed that Johnson threatened to harm him. It is in no way probative of the General Counsel's assertion that Johnson made such threats, especially because the order was issued ex parte, it contains no findings of fact or conclusions of law, and Johnson is not a party to this proceeding.

General Counsel Exhibits 4 and 5 amount to nothing more than a prior consistent statement by Kastens. These documents were offered by the General Counsel during his case-in-chief on direct examination of the Charging Party. As the Board has noted, "the Federal Rules of Evidence, Sec. 801.4.2 permits admission of prior consistent statements only where there is an express or implied charge of recent fabrication, or improper influence or motive," and an offer of

such a statement should be denied absent such impeachment. *Crown Bolt, Inc.*, 343 NLRB 776, 790, n.22 (2004). Thus, these irrelevant, misleading and prejudicial documents should never have been admitted in evidence and should not be accorded any weight with respect to the Administrative Law Judge's findings and conclusions.

Finally, a state judge in an ex parte proceeding relating to an order from protection against stalking could not address any issues of law or fact whether the Union has violated the NLRA. Indeed, such a determination is reserved exclusively to the jurisdiction of the NLRB. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (U.S. 1959). There is no potential for collateral estoppel or issue preclusion in this case based on these documents, and they do not support a finding of any violation of the Act.

B. Kastens Provoked the Verbal Confrontation with Johnson

The General Counsel clearly failed to prove that Johnson ever threatened to injure Kastens or to discriminatorily process his grievances. But even if the unsupported testimony of Kastens and Cronk is credited, despite the overwhelming body of evidence to the contrary, and it is found that Johnson did threaten Kastens, the General Counsel made no showing that these alleged threats were provoked by or made in response to Kastens's union activities. Violations of Section 8(b)(1)(A), including threats by union officials, require proof of causation – that is, that the charging party's protected activity was a substantial or motivating factor for the union's adverse actions against the charging party. *Ironworkers Local 340* (*Consumers Energy Co.*), 347 NLRB at 579; *Oil Workers Local 2-947* (*Cotter Corp.*), 270 NLRB 1311.

The General Counsel's claim fails because the evidence does not show any causal connection whatsoever between Kastens's union activity and any threats allegedly made by Johnson. Johnson did not target Kastens and threaten him when he realized that Kastens was

campaigning for an opposition candidate. Indeed, it was Kastens who crossed across five lanes of traffic to confront Johnson on April 11, 2014. (Tr. 362:13-364:4, 361:12-15, 408:19-409:7; Resp. Ex. 13) Kastens testified that when he approached Johnson, "Howard [Johnson] hadn't even acknowledged me yet . . . I proceeded to get his attention to tell him that he was in the wrong." (Tr. 158:24-159:2) Kastens indisputably initiated his exchange with Johnson. (Tr. 307:5-7) From the outset, Kastens was on the offensive. After crossing the street and confronting Johnson, Kastens moved within inches of Johnson's face and began shouting, "Hit me! Hit me!" (Tr. 304:2-8, 306:24-307:4, 407:21-25, 421:10-13, 431:1-10) Kastens admitted that he attempted to provoke Johnson into striking him. (Tr. 159:9-11)

The evidence establishes that Kastens acted in a calculated manner with the intent to provoke a confrontation and a physical response from Johnson. And Kastens cannot claim that any statements he made were in self-defense. After the exchange, he did not report any alleged threats to the police or to Spirit security personnel. (Tr. 192:21-193:4, 476:23-477:1, 211:11-19) He testified that he did not see his actions as "the acts of a person who is in fear of being physically harmed or beaten up." (Tr. 202:16-20) Kastens further testified that he "was upset and emotions took over" when he confronted Johnson. (Tr. 190:1) Thus, any statements which Johnson made in response to Kastens's outburst must be viewed in the context of the tense situation created by Kastens.

The causation in this exchange is clear. If it is assumed that Johnson threatened to strike Kastens, that threat was a direct result of Kastens's provocation. The fact that Kastens had been engaged in protected union activity beforehand had nothing to do with Johnson's defensive statements when Kastens verbally assaulted him. There is no question that Kastens's protected activity was not a substantial or motivating factor in the nature or tone of Johnson's statements

on April 11. The sole motivating factor was Johnson's defensive efforts to protect himself when Kastens sought to provoke a physical confrontation.

The Board has held that threats directed at a member's employment status arising out of intra-union friction, if uttered by an official who is in a position to carry out the threats, are a violation of the Act. *Toledo World Terminals*, 289 NLRB 670, 703 (1988) (citing *Carpenters Local 1281* (*Raber-Kief, Inc.*), 152 NLRB 629 (1965)). As discussed in Section IV.A, *infra*, Johnson was in no position to carry out any threats regarding Kastens's reinstatement. Kastens's grievances were transferred to District 70 and were in the exclusive control of Frank Molina several weeks before April 11. (Jt. Ex. 5 at 3) By April 1, Tom Hammond, the Union's attorney, had advised Molina to settle the grievances before arbitration. Johnson played no role whatsoever in the investigation or processing of Kastens's grievances. (Tr. 298:19-24) He testified to his understanding that the grievances were handled by Molina. (Tr. 298:25-299:12) This testimony was not rebutted.

Johnson explained that as an In-Plant Representative, he often tried to resolve grievances at Step One or Step Two. After the second step grievances were transferred to the District for processing. (Tr. 298:8-18) Johnson never had any discussions at any time with Molina about the Kastens's and Lehman's discharge grievances; he never discussed the cases with the Union's counsel; and he in no way attempted to influence Molina's decisions in regard to the processing of the grievances. (Tr. 299:13-19, 507:14-18, 97:24-98:9)

The evidence that Johnson never communicated with Molina about Kastens's discharge or discharge grievance is not disputed. Kastens admitted that Molina made the decision not to arbitrate the grievance, which both Johnson and Molina confirmed. (Tr. 178:18-24, 298:25-299:12) Johnson never had any discussions at any time with Molina about the handling of

Kastens or Lehman's case, and he in no way influenced Molina's decisions in regard to the processing of the grievances. (Tr. 299:13-19, 97:24-98:9) Hammond never discussed the grievances with Johnson or any Union official other than Molina. (Tr. 507:14-23)

Accordingly, even if Johnson had threatened to interfere with Kastens's employment rights or had threatened to discriminatorily process his grievances, he had no ability to follow through with such a threat. Tim Johnson investigated and processed Kastens's discharged grievance in the initial stages, and then transferred the matter to Molina. Johnson never had any involvement in processing Kastens's grievances, so he could not harm the Charging Party's case. And he had no ability to influence Molina or Hammond with respect to the decision not to take Kastens's case to arbitration. The General Counsel has failed to prove any violation of the Act based on alleged threats made by Johnson.

C. Kastens Lost the Protection of the Act

Even if Johnson did threaten to cause bodily injury to Kastens and to discriminatorily process his grievances, those actions would not constitute a statutory violation by the Union because Kastens lost the protection of the Act through his own misconduct and threats of violence. In this connection, it is well-established that "employees can lose the protection of the Act by conduct that fairly can be characterized as opprobrious or extreme." *U.S. Postal Serv.*, 251 NLRB 252 (1980). This principle has been applied in numerous cases in which an employee's actions would usually be protected but subsequently lose their protection due to the employee's misconduct. *See, e.g., Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984) (strikers lost protections of the Act when they engaged in violent, coercive or intimidating activities on the picket line); *In Re Am. Golf Corp.*, 330 NLRB 1238, 1241 (2000) (quoting *NLRB v. Electrical Workers UE Local 1229* (*Jefferson Standard*) 346 U.S. 464 (1953)) (employee who

engaged in handbilling which made "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income" without mentioning labor dispute lost concerted activities protection of the Act); *Douglas Autotech Corp.,* 357 NLRB No. 111 (Nov. 18, 2011) (striking employees lost their statutory protection when they began an unlawful economic strike without first filing a notice with the Federal Mediation and Conciliation Service as required by the Act).

The long line of Board decisions concerning violent or intimidating conduct on the picket line is instructive. It is well established that actual violence or serious misconduct on the part of striking employees will remove the strikers from the protections of the Act, thereby allowing the employer to discharge them for misconduct. *See, e.g., Coronet Casuals, Inc.,* 207 NLRB 304, 305 (1973). In *Clear Pine Mouldings,* the Board established that actual violence, as opposed to verbal threats or implications of violence, is not necessary for an employee to lose protection of the Act:

> Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the United States Court of Appeals for the First Circuit that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." We also agree with the United States Court of Appeals for the Third Circuit that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm."

268 NLRB at 1045-46 (internal citations omitted).

The Board then adopted the following *objective test* for determining whether the actions or statements of strikers to other employees were sufficient to remove the strikers from the protection of the Act: "whether the misconduct is such that, under the circumstances existing, it

may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Id.* (quoting *NLRB v. W. C. McQuaide, Inc*., 552 F.2d 519, 527 (3d Cir. 1977)).

The rationale of this rule is consistent with the equitable defense of unclean hands – if the party alleging discrimination has himself committed acts that are as bad or worse than the acts committed by the alleged discriminator, he should lose any right he may have arguably had to recovery. The "reasonably tends to coerce or intimidate employees" standard has been expressly applied by most circuit courts. *See, e.g., Medite of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 790 (10th Cir. 1995); *General Indus. Employees Union, Local 42, Distillery, Rectifying, Wine and Allied Workers' Intern. Union, AFL–CIO v. NLRB*, 951 F.2d 1308, 1314 (D.C. Cir.1991); *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 295 (7th Cir. 1987).

Application of the *Clear Pine Mouldings* analysis is straightforward: an employee cannot prevail on an unfair labor practice charge based on the allegation that the employer discharged him for strike-related activities when the employee participated in misconduct that was violent, coercive or intimidating. The same analysis applies to this case.

In the amended complaint, the General Counsel alleges that the Union violated the Act when Johnson made threats against Kastens based on his protected activities on April 11, 2014. (GC Ex. 1-P at 3) These alleged threats took place on or near the main entrance to Spirit's plant. (Resp. Ex. 13) Seven witnesses, including Kastens, testified that the Charging Party attempted to provoke a violent reaction from Johnson, shouting "Hit me!" repeatedly and telling Johnson "to take his best shot." (Tr. 304:2-8, 306:24-307:4, 407:21-25, 421:10-13, 431:1-10) Kastens charged across five lanes of traffic, confronted Johnson, moved aggressively within inches of Johnson's face, and screamed at Johnson in an effort to intimidate and provoke him. (Tr. 362:13-364:4, 361:12-15, 408:19-409:7, Resp. Ex. 13)

After April 11, Kastens publicly threatened Johnson in his Facebook postings. (Tr. 193:21-194:11) On May 1, 2014, Kastens threatened to break Johnson's hip and referenced his concealed handgun license, suggesting that he would shoot Johnson:

> I would break his [Johnson's] hip it if made it that far. Better to have the paperwork watching my ass. I have my conceal carry. I'm not worried about him. I'm pushing his removal from office more than anything.

(Resp. Ex. 2)

Kastens cannot now prevail on a claim that his statutory rights were violated because he lost the protection of the Act by reason of his own misconduct and threats of violence. This would be true even if Kastens had been engaged in protected union activity at the time of the incident whether or not Johnson had made any threats against him. On April 11 and thereafter, Kastens's verbal and nonverbal efforts to provoke violent conduct and threats of violence were reprehensible. Thus, the allegation that Johnson made unlawful threats against Kastens should be summarily rejected. *Clear Pine Mouldings*, 268 NLRB at 1045-46.

IV. The Union Processed Kastens's Grievances in Good Faith

The General Counsel alleges that the Union violated Section 8(b)(1)(A) of the Act because it has "refused to process to arbitration grievances concerning Ryan Kastens' November 4, 2013, December 23, 2013, February 13, 2014 suspensions and March 5, 2014 discharge that Kastens filed under the provisions of the agreement." (GC Ex. 1-P at 4) The amended complaint asserts that the Union refused to process these grievances to arbitration because of Kastens' dissident union activity and that the Union's reasons for its alleged refusal were arbitrary, discriminatory or in bad faith. (GC Ex. 1-P at 4)[4]

[4] The amended complaint does not allege any violation of the Act regarding the processing of Jarrod Lehman's suspension and discharge grievance, and the General Counsel has never suggested such a violation occurred. Indeed, Lehman expressed his gratitude to Frank Molina for his efforts in settling his discharge grievance. (Tr. 555:23-556:21, 556:23-24, 267:18-20)

The duty of fair representation is violated when a union acts in a way that is arbitrary, discriminatory, or in bad faith. As the duty relates to a labor organization's processing of grievances, the union may not ignore a meritorious grievance or process the grievance in a perfunctory, bad-faith fashion. *Vaca*, 386 U.S. at 191. No employee, however, has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. *Id*. Indeed, "[a]n employee has no absolute right to insist that his grievance be taken to a certain level; a 'union may screen grievances and press only those that it concludes will justify the expense and time involved in terms of benefiting the membership at large.'" *Thompson v. Aluminum Co. of America*, 276 F.3d at 658 (internal citations omitted).

In *Letter Carriers Branch 6070,* (*Postal Service*), the Board explained:

> When a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith, it breaches its duty of fair representation. But a union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union's performance must be "highly deferential." Mere negligence does not constitute a breach of the duty of fair representation. And a union's conduct is arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational.

316 NLRB 235, 236 (1995).

Moreover, a union need not be correct in its analysis if it decides not to arbitrate a grievance; it need only act reasonably. *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522 (6th Cir. 1993) (holding a union's actions may be challenged only if wholly irrational.). To comply with its duty, a union must conduct some minimal investigation of grievances brought to its attention. *Stevens v. Moore Bus. Forms, Inc.,* 18 F.3d 1443, 1446 (9th Cir. 1994) (citing *Tenorio v. Nat'l Labor Relations Bd.,* 680 F.2d 598, 601 (9th Cir.1982)).

In this case, the General Counsel's claim fails for several reasons. First, no prima facie case was made because no animus on the part of District President Frank Molina was shown that could support an inference of discriminatory conduct. Another factor is that the Union diligently performed a complete investigation of Kastens's grievances. This involved following all standard practices in processing grievances, including submission to the employer of a comprehensive request for information, interviews of the grievant, and a review of relevant arbitral precedent. Molina also sought the advice of outside counsel, who reviewed relevant documents before advising him that arbitration would not be successful. When Molina made a reasonable decision not to arbitrate, he still worked diligently to negotiate the best settlement agreements that could be obtained for both Kastens and Lehman. The Union did not breach its duty of fair representation in regard to the processing of Kastens's grievances.

A. There Is No Evidence of Discriminatory Animus Against Kastens

A prima facie showing of a violation of Section 8(b)(1)(A) requires proof of a unit member's protected activity, the Union's knowledge of that activity, and animus against the unit member because of his protected activity. *Machinists Dist. 751* (*Boeing Co.*), 270 NLRB at 1065. In this case, the General Counsel has failed to make a prima face showing that Respondents breached their duty of fair representation by failing to process Kastens's grievances to arbitration. Even assuming that the General Counsel has offered sufficient evidence to prove that Kastens had been engaged in protected activity by opposing the re-election of incumbent Grand Lodge officers, and further assuming that the Union officials were aware of that activity, the complaint allegations should be rejected because there was no showing of any animus on the part of Frank Molina or other responsible Union officials.

As Kastens admitted at hearing, it was Frank Molina who processed his grievances and made the decision not to arbitrate them. (Tr. 178:18-24) But no evidence was offered supporting the General Counsel's theory that Molina harbored a discriminatory animus against Kastens:

> Q BY MR. TANNER: Do you have any documents that reflect Mr. Molina decided not to arbitrate your case, your discharge grievance, because of your support for Jay Cronk?
> A No.
> Q Okay, did you receive any text messages saying that he was not going to arbitrate your grievance because of your support for Jay Cronk?
> A No.
> Q Do you have any audio recordings that reflect that?
> A No.

(Tr. 180:10-20) (examination of Charging Party Kastens) Molina testified that he never sent any text messages or e-mails to Kastens regarding his Union political activities or warning Kastens against supporting a particular candidate in the International Union election. (Tr. 559:3-12)

Further, there is no circumstantial evidence of any discriminatory bias on the part of Molina. Instead, the totality of the evidence shows that Molina had made diligent efforts to protect Kastens and keep him employed with Spirit despite any political differences they may have had. When Kastens's direct supervisor, Robbin Ketterman, sought to discharge Kastens for his fourth disciplinary violation in December 2013, Molina pleaded with Ketterman to give Kastens one more chance. (Tr. 462:25-463:4) Because of Molina's efforts, Ketterman agreed to allow Kastens to keep his job and she reduced the discipline to a second three-day suspension. (Tr. 462:25-464:4)

Molina testified that at the time he saved Kastens's job in December 2013, he was already aware that Kastens supported opposition candidate Jay Cronk, but that had no effect on his efforts in representing Kastens. (Tr. 94:18-95:14) Molina also personally handled and pursued claims on behalf of other unit employees who supported Cronk during that period,

proving that he acted in good faith in his representative capacity on behalf of all unit employees, without any alleged animus playing any role in his decision making. (Tr. 95:17-96:14)

The General Counsel may contend that the Union did not arbitrate Kastens's grievances because of the alleged hostility of Howard Johnson toward the Charging Party. But finding a statutory violation based on this unmitigated speculation is a bridge too far. There is no evidence that Johnson ever took any actions against either Charging Party because of his union activity.

Additionally, Kastens admitted that Molina alone made the decision not to arbitrate his grievances, which Johnson confirmed. (Tr. 178:18-24, 298:25-299:12) Johnson never had any discussions with Molina about the handling of Kastens's discharge grievance, and he in no way influenced Molina's decisions in regard to the processing of the grievance. (Tr. 299:13-19, 97:24-98:9) Tom Hammond, the Union's counsel, never discussed the grievances with Johnson or any Union official other than Molina. (Tr. 507:14-23) Any bias allegedly harbored by Johnson against Kastens cannot be imputed to Molina or the Union because witnesses for both sides testified that Molina was solely responsible for the decision not to arbitrate the discharge grievance.

In another case with similar operative facts, the Board found that the General Counsel did not make a prima facie showing that the union violated the Act by failing to process a discharge grievance on behalf of a former employee. In *Machinists District 751* (*Boeing Co.*), the Board rejected the Section 8(b)(1)(A) allegations, finding that the union's failure to process the employee's grievance was not caused by discriminatory animus despite a shop steward's reference to the charging party as a "scab." 270 NLRB at 1065-66. Even though the steward's statements suggested that he held some discriminatory animus against the former employee, the

steward had no authority to file or process a discharge grievance, so his statements did not constitute any evidence of union animus. *Id.*

In this case, proof of negative statements allegedly made by Johnson cannot satisfy the General Counsel's burden of proving union animus. To make a prima facie showing, the General Counsel must prove that the decision not to process Kastens's discharge grievance to arbitration was due to an animus held by Molina. And as discussed, not a shred of evidence was produced to adduce such a conclusion.

Moreover, even if Molina had made statements similar to those allegedly made by Johnson (which has not been shown here), the General Counsel still would not have made a prima facie case. In *Machinists District* 751, the Union Business Representative responsible for not processing a former employee's discharge grievance had also previously referred to the employee as a "scab," but this was insufficient to establish a prima facie case. 270 NLRB at 1065-66. The Board reasoned:

> The key question is whether there was any causal connection between the Union's hostility against [charging party] Holston because of his protected activity and its failure to process his grievance . . . Here the only evidence of hostility were the remarks of the shop steward and the business representative to Goddard . . . Those remarks are much less important than the actions the Union actually took with regard to the discharge.

Id. at 1066. *See also American Postal Workers Union, AFL-CIO*, 327 NLRB 759 (1999) (finding no Section 8(b)(1)(A) violation for Union's refusal to process constructive discharge grievance because there was no casual connection between perceived hostility and decision). Clearly, no prima facie case was made here.

At hearing, Counsel for the General Counsel presented e-mails from Molina to Ron Eldridge and Don Barker (GC Ex. 15 at 3-4) by which the Union President forwarded draft grievance settlement agreements to the International Union representatives. But this is proof of

nothing. There is no evidence that Eldridge or Barker had any animus toward Kastens, that they had any influence on Molina's decision not to arbitrate, or that they were even aware of Kastens's union activity. Instead, as Molina testified, he regularly sends a copy of grievances that he handles to the Grand Lodge representatives involved in the collective bargaining relationship with Spirit to keep them informed as the matters. (Tr. 38:2-39:8; GC Ex. 7) And when Molina forwarded the draft settlement language to Eldridge and Barker, he was merely sending them a courtesy copy. (GC Ex. 7 at 3-4)

B. The Union Would Have Taken the Same Action Regarding Kastens's Grievances Absent His Union Activity

The General Counsel made no prima facie showing that the Union violated the act by making the rational decision not to arbitrate Kastens's grievances. Assuming for the purpose of argument that a prima facie case was made, the Union decisively rebutted the allegations. If a prima facie violation is shown, the Union must then prove "that it would have taken the same action even in the absence of [the Charging Party's] protected activity. *Ironworkers Local 340* (*Consumers Energy Co.*), 347 NLRB at 579.

In *Machinists Dist. 75,* the Board dismissed the General Counsel's complaint for failure to establish a prima facie violation of Section 8(b)(1)(A), then explained why the complaint would have been dismissed even if such a violation had been established:

> Assuming for the purpose of argument that the protected activity, the union knowledge, and the limited union hostility toward Holston were, under the circumstances set forth above, sufficient to establish a prima facie case that the failure to process the grievance was partially motivated by Holston's protected activity, the Union's defense would be sufficient to rebut that prima facie case. The Company has an elaborate multistep procedure for deciding on discharge. When such a decision is made, the Company generally sticks by it. The Union knows that the Company elaborately documents the reasons for such discharges and the Union's practice is to be very selective in deciding which grievances to process. With regard to Holston's complaints that preceded the discharge, Shop Steward Stoof performed the limited function that was required of him. When

> Holston asked him to call the business representative, he did so. When those matters were brought to Business Representative Munson's attention, he came to the plant, spoke to Holston, and then investigated by interviewing the other people concerned. There was no credible showing that he acted unreasonably or arbitrarily. With regard to the discharge Munson listened to Holston's position in the initial telephone call and then in a detailed conversation in the union office. Munson investigated the situation and spoke at length to both management officials and other employees who had knowledge of the situation. He reviewed the entire company file on Holston. His conclusion that Holston did not have a winable grievance was neither unreasonable nor arbitrary. His testimony that his evaluation was uninfluenced by his knowledge that Holston was not a union member was quite credible.

270 NLRB 1059, 1066 (1984).

In this case, the Union conducted a thorough investigation of Kastens's grievances. The investigation included discussions with the grievant, participation in investigatory interviews by management, the submission of comprehensive information requests to the Company, a thorough review of Company files, and relevant arbitral awards. These are standard practices followed by the Union in investigating and processing a discharge grievance. Frank Molina also performed extensive research of arbitral precedent and consulted the Union's attorney. When he was advised by the attorney that the Union could not prevail in arbitration, he made the rational decision not to proceed to arbitration and waste thousands of dollars of the members' money for arbitration and attorney fees. Molina's decision was not arbitrary, unreasonable, or made in bad faith. To find otherwise would shock the conscience or strain the credulity of any reasonable person.

1. The Union Fully Investigated and Processed Kastens's Grievances

The Union conducted a complete and thorough investigation of Kastens's grievances before deciding not to proceed to arbitration. At the outset, In-Plant Representative Tim Johnson handled the grievances. He attended the Company's investigative interviews and prepared thorough notes at Molina's direction. (Tr. 567:8-16, 551:22-25, 561:18-562:2) Kastens testified

that he never expressed any concern about Tim Johnson's investigation of his grievance. (Tr. 578:7-9) Instead, he thanked Johnson for his efforts. (Tr. 544:18-545:1)

Molina also discussed the status of the grievances with Kastens throughout the entire process. (Tr. 543:14-544:8, 147:15-18, 147:19-148:14, 553:16-25) When Johnson could not resolve Kastens and Lehman's grievances, he sent a formal referral letter to Molina, who then stepped in to handle the investigation. (Tr. 567:8-18, 544:12-545:6; Jt. Exs. 5 at 3, 19) Molina then discussed the case with Johnson and Kastens. (Tr. 552:18-21, 551:1-9, 567:9-23, 575:4-11) Next, he sent an information request to the employer in accordance with his standard practice in processing discharge grievances in order to gather all information necessary to resolve the dispute. (GC Ex. 7; Tr. 39:16-40:6, 550:6-25)

Kastens admitted at hearing that the investigation of his discharge grievance could not have been more thorough because once Molina received the information requested from the Company, "he had all the files. He had all the information he should have needed." (Tr. 577:14-15)

Molina then performed extensive research of past arbitration awards to determine whether the grievances had any chance of success. (Tr. 554:13-25; Resp. Ex. 11) Respondents introduced one such award in a discharge case arbitrated in 1993 by District 70 against Spirit's predecessor, The Boeing Co., on behalf of Grievant Ronald French. The Union lost the case. (Resp. Ex. 11) None of the past awards in the Union's archives supported Kastens's discharge grievance. (Tr. 555:1-13)

Molina also consulted Tom Hammond, who, after reviewing all relevant documents, advised him that the Union would not prevail at arbitration. This deliberate process certainly exceeds the "minimal investigation of grievances brought to its attention" necessary to satisfy the

duty of fair representation. *Stevens v. Moore Bus. Forms, Inc.*, 18 F.3d at 1446. And in any event, the duty of fair representation does not require a union to follow any particular procedures in processing grievances. *See Douglas Aircraft Co*., 307 NLRB at 557.

Molina gave ample consideration to Kastens's grievances before deciding to attempt to settle them. He also considered the potential arbitration costs to the Union and its members if the in relation to the potential for success: "I'm the Steward over the Machinists' Union in Kansas and their money, and I've got to make that decision whether to spend the money on arbitration." (Tr. 554:20-25) These are valid factors that should be considered before any decision to arbitrate is made. *See Thompson v. Aluminum Co. of America*, 276 F.3d at 658.

After deciding not to arbitrate the discharge grievance, Molina also acted diligently in trying to obtain the best possible settlement for Kastens. He first proposed reinstatement and finally was forced to accept a $2,000 payment. Kastens accepted and cashed the employer's check. (Tr. 562:3-13, 563:2-6, 562:12-563:1; Jt. Ex. 8)

It is immaterial whether Kastens would have preferred to go to arbitration instead of settling the grievance. No employee has an "absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement." *Vaca,* 386 U.S. at 191. Molina relied on the advice of counsel and used his best judgment in determining whether to arbitrate or settle the discharge grievance, and any objection Kastens may have had to settlement would constitute a disagreement about strategy, which is not sufficient to show a breach of the duty of fair representation. *Johnson,* 843 F. Supp. at 948.

The General Counsel also cannot base its argument of arbitrary or bad faith processing of Kastens's grievances on an alleged failure by Molina to communicate with Kastens regarding the progress of his grievances, as Kastens suggested during his testimony. In this regard, the

evidence adduced at hearing demonstrated that Molina did communicate with Kastens throughout the grievance process. (Tr. 543:14-544:8, 147:15-18, 147:19-148:14, 553:16-25) But even if Molina had failed to communicate extensively, this would not support the conclusion that he acted arbitrarily because "as a matter of law, the failure to keep a grievant informed of the status of the grievance is not a breach of the duty of fair representation." *Caputo v. Nat'l Ass'n of Letter Carriers*, 730 F. Supp. 1221, 1230 (E.D.N.Y. 1990). *See also Pac. Mar. Ass'n*, 321 NLRB 822, 823 (1996) (failure by union to hold formal hearing on grievance, or to expressly inform grievant that he did not have a right to such a hearing, was not a violation of the duty of fair representation); *Higdon v. United Steelworkers of America*, 706 F.2d 1561 (11th Cir. 1983) (the union's failure to give grievant notice of and the opportunity to attend one segment of his grievance process was not a breach of duty); *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975) (the union's failure to keep grievant informed of the status of his grievance was insufficient to support a claim of unfair representation); *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973) (in the exercise of its discretion, the union need not provide notice or obtain the employee's consent before settling a grievance).

Additionally, even if the Union had never interviewed or taken a statement from Kastens during its investigation of his grievances before deciding to settle, this would still not constitute a breach of the duty of fair representation. *See Asbestos Workers Local 17* (*Catalytic, Inc*.), 264 NLRB 735 (1982) (union lawfully agreed to discharges of grievants after reviewing the work alleged to be substandard and their attendance records without interviewing grievants or obtaining their side of the story); *San Francisco Web Pressmen*, 249 NLRB 88 (1980) (union did not breach its duty when it only interviewed employee eyewitnesses and employee whom grievants had allegedly threatened during its investigation into merits of the grievance), *rev'd.*

sub nom. Tenorio v. NLRB, 680 F.2d 598 (9th Cir. 1982), *on remand*, 267 NLRB 451 (1983); *Plumbers Local 195 (Stone & Webster Engineering Corp.)*, 240 NLRB 504 (1979) (union lawfully relied on statements provided by employer witnesses, which were corroborated by objective evidence, in dismissing grievance).

The Union, through Tim Johnson and Frank Molina, conducted a thorough, thoughtful and deliberate investigation into the circumstances surrounding the grievances of Kastens and Lehman. Based on all potentially relevant information and documents, arbitral precedent, and the advice of counsel, Molina decided not to take Kastens's grievances to arbitration. As the U.S. Supreme Court explained in *Air Line Pilots Ass'n, Int'l v. O'Neill*, "[i]n labor disputes, as in other kinds of litigation, even a bad settlement may be more advantageous in the long run than a good lawsuit." 499 U.S. 65, 81 (1991). The Union's decision to settle Kastens's grievances was not discriminatory, arbitrary, or in bad faith.

2. Kastens's Grievances Lacked Merit

The General Counsel failed to prove that Kastens's grievances were in any way meritorious. Instead, various documents established that Kastens's violation of Spirit's disciplinary policies in January 2014 constituted a terminable first offense. Kastens's disciplinary record also made termination automatic as the fifth disciplinary action within 12 months; and the inclusion of a Last Chance Agreement in his penultimate disciplinary memo meant that he had no chance of prevailing if the Union had processed his grievances to arbitration. This utter lack of merit, upon which the Union based its decision not to process Kastens's grievance to arbitration, further rebuts any argument that the Union breached its duty of fair representation. *See Local 337 Teamsters*, 307 NLRB 437 (1992) (reversing finding of Section 8(b)(1)(A) violation on the ground there was insufficient evidence of a meritorious grievance).

a. Kastens's Misconduct Constituted a First-Time Terminable Offense

By forwarding an e-mail with confidential security video to approximately 71 different e-mail addresses, 11 of which were outside of the Spirit e-mail system, Kastens violated Spirit's *Release of Information Outside Spirit AeroSystems* policy, OP2-17. (Jt. Ex 13; Tr. 514:7-20) He also violated several other policies relating to acceptable use of Company computer resources and electronic mail. (Jt. Exs. 11, 12) Under the Company's Disciplinary Guidelines Subsection L, "Unauthorized disclosure of Company trade secrets and private or confidential information to employees, customers, friends, relatives, general public or new media" is designated as an offense which warrants termination in the first instance. (Jt. Ex. 14 at 7)

Spirit's Vice President of Human Resources testified that the disclosure of protected information in violation of this provision of the Disciplinary Guidelines is a terminable offense standing alone and that in the past, Spirit has discharged other employees for the same or similar offenses as that committed by Kastens and Lehman. (Tr. 517:6-15) When Union counsel Tom Hammond was contacted by Frank Molina and reviewed the relevant documents in this case, including the Disciplinary Guidelines and Kastens's disciplinary memo, he noted that Kastens had committed a "one-time offense" for which other employees had been discharged in the past. (Tr. 496:12-14) Hammond informed Molina of this summary discharge provision, so the Union based its decision not to arbitrate in part on the fact that the Company would have discharged Kastens for severe misconduct even without a prior disciplinary record.

b. Kastens's Disciplinary History Made Termination Automatic

Kastens's discharge grievance lacked merit because his misconduct regarding the video was a first-time terminable offense, that was not the only reason that the Union could not have prevailed in arbitration. Kastens had already received four disciplinary actions against him for

misconduct in the 12 months leading up to his discharge. (Jt. Ex. 10 at 2-5) Under the Company's Disciplinary Guidelines, the following is described as a one-time offense warranting termination:

> M. Generally unacceptable conduct where the employee had accumulated four disciplinary actions within a year, and received a fifth disciplinary action for any reason during the year following the fourth disciplinary action.

(Jt. Ex. 14 at 7). Justin Welner testified as to the consequences of a fifth disciplinary action within that time period:

> A . . . Once you get four disciplinary actions in a year, you basically have to go twelve months without getting another or you are terminated.
> Q And what happens if you -- based on the Spirit policy, if you get a fifth disciplinary within a year?
> A You are terminated?
> Q Is that automatic?
> A That is automatic.

(Tr. 519:1-17; Jt. Ex. 14 at 6-7) Thus, even if Kastens's misconduct concerning the video had not constituted a first-time terminable offense under Subsection L of the Company's Disciplinary Guidelines, his discharge still would have been automatic under the employer's policy. He would have been discharged without regard to the nature of misconduct.

Hammond testified that when he reviewed Kastens's disciplinary record, the past disciplinary forms had the term *closed* written on them, so it was the attorney's understanding that they were closed and included in Spirit's personnel records. (Tr. 505:8-22) Additionally, Kastens testified that he filed his suspension/discharge grievance with the District rather than Local Lodge 839 because he had already been informed that In-Plant Representative Tim Johnson was unable to settle his previous two grievances, so he knew that the District would have those grievances in its possession. (Tr. 146:2-10) The General Counsel offered no evidence and made no attempt to show that these prior grievances were still outstanding; and he failed to

introduce any testimonial or documentary evidence relating to the investigation and termination of those grievances; so it must be presumed that they had been concluded and were part of Kastens's disciplinary record. Thus, his suspension for e-mailing the security video was his fifth recorded disciplinary action within the preceding 12 months.

Hammond reasoned that the Union probably would lose the discharge grievance in arbitration due in part to Kastens's "progressive discipline issues," which made his discharge automatic under Company policy. (Tr. 496:14-15) The Union took this factor into consideration when deciding against arbitration.

c. Kastens Was Subject to a Last Chance Agreement

Further, at the time Kastens circulated the security video in violation of Company policy, he was already subject to a Last Chance Agreement (*LCA*). Because of the weight given by arbitrators to employer discretion when an LCA is in place, arbitration would not have been feasible.

i. Discharge Decisions Involving Last Chance Agreements Are Rarely Reversed in Arbitration

The use of Last Chance Agreements is a common practice common in many industries. An LCA provides an employee subject to discipline a final chance to improve his conduct with the understanding that if he fails to do so, the employer is entitled to summarily discharge the employee upon commission of the next wrongful act. As one arbitrator explained, an LCA is

> an agreement outside of the collective bargaining agreement that is strictly construed and enforced. It can be viewed as a modification of the master collective bargaining agreement in their application to special employees, where the Employer gives valuable consideration by giving up a contended right to discharge an employee and the employee in exchange forfeits for that limited period negotiated rights (except those spelled out in the [Last Chance Agreement]) in order to demonstrate to the Employer that he or she merits retention rather than discharge.

Ingersoll-Dresser Pump Co., 114 LA 297, 301 (Bickner, 1999). *See also United States Dep't of the Air Force v. Federal Labor Relations Auth.,* 949 F.2d 475, 477 (D.C.Cir.1991) (an LCA is a "contract[ ] between [employer] and employee to suspend disciplinary action pending a probationary period in which the employee is afforded a chance to improve his or her performance.").

After an employee enters into a valid LCA with the employer, if the employee is discharged for breaching the LCA, it is extremely difficult for the union to overcome the agreement and prevail in arbitration. "Normally last chance agreements are binding in arbitration." *Ohio Edison Co. v. Ohio Edison Joint Council,* 947 F.2d 786, 787 (6th Cir. 1991). The reason is that the LCA supersedes the collective bargaining agreement, so any arbitrator considering a challenge to a discharge under an LCA can only consider whether the terms of the agreement were violated, not whether the discipline scheme or good cause provisions under the CBA were followed. Thus, a labor organization could rarely breach its duty of fair representation by deciding not to arbitrate a grievance with such a low probability of success.

ii. Kastens Entered Into a Valid Last Chance Agreement

A valid LCA requires the employer to provide consideration – generally, giving up its right to immediately discharge the employee for recent misconduct – and a standard of fairness which is demonstrated by the designation of a specific probationary period during which the employee will be subject to the agreement's terms. *See Central Ohio Transit Auth*., 113 LA 1134 (Imundo, Jr., 2000). The LCA also must clearly establish what type of employee conduct will result in discharge. *See Ingersoll-Dresser Pump Co*., 114 LA at 301. Prudently, most arbitrators expect LCAs to be in the form of written agreements signed by the employer and the employee

or union. *See Appalachian Reg'l Healthcare*, 112 LA 884 (Murphy, 1999); *Minnegasco, Inc*., 110 LA 1077 (Jacobowski, 1998).

In this case, Kastens entered into a valid and binding LCA with Spirit. When the Company filed its disciplinary action form against Kastens on December 6, 2013, management arguably had the right to discharge him immediately under its progressive discipline policy. (Jt. Exs. 10 at 2, 14) Due solely to the efforts of Frank Molina, Spirit instead decided to designate the time during which Kastens had been off work as a disciplinary suspension, and included the following language in the disciplinary memo: "Upon receipt of this 4th Disciplinary Memo, if you receive any type of discipline in the next 12 months, you will be terminated for generally unacceptable misconduct." (Jt. Ex. 10 at 2; Tr. 462:25-464:4) The document was signed by Kastens, his manager, and a Union representative. (Jt. Ex. 10 at 2)

The Counsel for the General Counsel introduced two formal *Reinstatement and Last Chance Agreement* documents which were presented by the Company to employees in 2012 and 2013. (GC Exhibits 18, 19) The General Counsel may argue that because the December 6 disciplinary memo was not memorialized in this form, it was not a genuine LCA. As Molina testified, however, Spirit puts some, but not all, LCAs in a formal document. The LCAs he has personally dealt with in the past are not customarily put in the same format as was used for General Counsel Exhibits 18 and 19. (Tr. 124:1-5) Moreover, Tom Hammond, Union counsel, testified that the disciplinary memo included what he regarded as last chance language (Tr. 504:10-25), and he has been involved in numerous disciplinary matters on behalf of District 70 since the mid-1980s. Hammond informed Molina of his conclusion and legal opinion, and Molina relied on counsel's advice in considering Kastens's fourth disciplinary memo an LCA for purposes of his determination of the merits of the discharge grievance. (Tr. 496:24-497:1)

When the December 6, 2013 disciplinary form was issued, the Company relinquished its right to discharge Kastens and set a specific period of time – 12 months – during which the LCA would be in effect. Spirit also clearly established what type of conduct would result in termination: conduct that would result in "any type of discipline" under normal circumstances. Although this may appear to be a rather broad range of conduct warranting termination, LCAs with similar language have been held to be enforceable. *See, e.g., Burns v. Salem Tube, Inc.,* 381 F. App'x 178, 179 (3d Cir. 2010) (holding that LCA was enforceable and that union did not violate its duty of fair representation when it did not contest the employee's discharge where LCA provided that the employee must abide by all areas of the Union Contract, the Plant Rules, and the Safety Rules and Regulations, and that any infraction of the Last Chance Agreement within 36 months from the date of its acceptance would constitute immediate termination; *Tootsie Roll Indus., Inc. v. Local Union No. 1, Bakery, Confectionery & Tobacco Workers' Int'l Union*, 832 F.2d 81 (7th Cir. 1987) (LCA providing for termination in event employee was absent more than once per month "for any reason whatsoever" was enforceable despite liberal shop policy of not counting excused absences).

iii. An Arbitrator's Decision Would Have Been Limited to a Finding Whether the Last Chance Agreement Was Breached

It is now axiomatic that unions rarely prevail in arbitration when contesting discharge decision involving an LCA. Both Hammond and Molina testified that this was a significant factor in their analysis and decision not to arbitrate Kastens's discharge grievance. Molina observed that both Spirit and its predecessor used LCAs, and his research showed that the Union had never prevailed in arbitration in a discharge case when an LCA was in effect. Indeed, "[m]ost arbitrators uphold discharges where the last-chance agreement clearly and

unambiguously defines the conditions of employment and the grounds for immediate termination." Elkouri & Elkouri, *How Arbitration Works* 972-73 (6th Ed. 2003) (compiling arbitration awards). The reason is that once an arbitrator has determined an enforceable LCA exists, the arbitrator's role is limited to determining whether the employee violated the terms of the agreement. *Ingersoll-Dresser Pump Co*., 114 LA 297. "Even a *de minimis* violation of an LCA entitles the employer to impose the sanction provided for under the LCA." *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers* (*PACE*), *Local 7-0159,* 309 F.3d 1075, 1085-86 (8th Cir. 2002).

In this respect, the LCA takes precedence over the contract provisions relating to discipline. *See Int'l Union of Operating Eng'rs, Local 351 v. Cooper Nat'l Res., Inc.,* 163 F.3d 916, 919 (5th Cir. 1999) (*cert. denied*) (a last chance agreement "must be thought of as a supplement to the CBA," which "supersed[es the] CBA in certain circumstances because [it] reflects the parties' own construction of the CBA"); *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688,* 959 F.2d 1438, 1440-41 (8th Cir. 1992) (cert. denied) (holding that last chance agreement superseded collective bargaining agreement).

Therefore, if the termination decision is challenged through the grievance and arbitration process, the only issue for the arbitrator to determine is whether, during the relevant probationary period, the employee committed an act defined in the LCA as warranting termination. "'If the employee fails to measure up as promised in a last chance agreement, the [employer] may proceed to administer the discipline earlier suspended,' without reference to the collective bargaining agreement." *Coca-Cola Bottling Co.,* 959 F.2d at 1440. (quoting *United States Dep't of the Air Force v. Federal Labor Relations Auth.,* 949 F.2d at 477). The arbitrator must apply the plain language of the LCA: "However harsh or strict such terms and even though the

arbitrator may well regard such conditions as unfair, that cannot be his concern." *Kaydon Corp*., 89 LA 377, 379 (Daniel, 1987).

Significantly, most arbitration awards reinstating an employee following his discharge for breaching an LCA have been vacated upon review by federal courts, which have held consistently that the LCA should have been controlling with respect to the arbitrator's decision. *See, e.g., Anheuser-Busch, Inc. v. Brewers & Maltsters, Local Union No. 6, Int'l Bhd. of Teamsters, AFL-CIO*, 210 F.3d 378 (8th Cir. 2000) ("Here, once the arbitrator concluded Ferguson had violated Rule 16, the LCA required the arbitrator to uphold the bargained-for remedy-termination. The arbitrator exceeded his authority by substituting a different remedy, which the LCA expressly prohibited"); *see also Coca-Cola Bottling Co.*, 959 F.2d at 1442; *Int'l Union of Operating Engineers, Local 351*, 163 F.3d at 920; *Ohio Edison Co.*, 947 F.2d at 787; *Tootsie Roll Indus.*, 832 F.2d 81. It is extremely difficult for a union to prevail in arbitration where an enforceable LCA exists, and there are few possible grounds to set an LCA aside.

iv. The Union's Decision to Settle Kastens's Discharge Grievance Was Reasonable

Kastens entered into a valid LCA with Spirit at the time he received his fourth disciplinary memo (notice), which established that he would be discharged if he received any type of discipline in the next 12 months. (Jt. Ex. 10 at 2) Less than three months after the execution of the LCA, Spirit investigated Kastens for improperly circulating a security camera video which was the Company's property. The employer properly determined that the egregious violation of its internet and e-mail policies constituted severe conduct that made him subject to "any type of discipline." In accordance with the LCA, the Company discharged Kastens on March 5, 2014, citing the LCA in its disciplinary action form:

> Ryan, on 12/6/13 you were issued a suspension which indicated that if you received any type of discipline in the next 12 months, you would be terminated for generally unacceptable conduct. As a result of this investigation, your employment with Spirit Aerosystems, Inc. is terminated effective immediately.

(Jt. Ex. 10 at 1)

After the Company terminated Kastens, the Union could have pursued the grievance to arbitration if it foresaw any chance of success on the merits. *See Cross Oil Ref. Co*., 111 LA 1013, 1023-24 (Bumpass, 1999) (an LCA cannot deprive either the union or the employee access to the grievance and arbitration procedure). However, as explained above, the only issue in arbitration would have been whether the Company violated the express terms of the LCA. The employee is not entitled to the benefit of the CBA's progressive discipline scheme when termination pursuant to an LCA is challenged. *Cutler-Hammer Corp.,* 110 LA 467 (Franckiewicz, 1998). And a challenge to a discharge decision based on an LCA rarely succeeds.

Because of the wide discretion given to unions in deciding whether to arbitrate a grievance -- and because of the low probability of success for these types of grievances -- as a general rule a labor organization does not breach its duty of fair representation when it decides not to pursue an LCA discharge grievance to arbitration. In *Burns v. Salem Tube, Inc.,* the employee was offered an LCA in lieu of discharge which provided that the employee must abide by all areas of the Union Contract, the Plant Rules, and the Safety Rules and Regulations, and any infraction of the LCA within 36 months from the date of its acceptance would constitute immediate termination. 381 F. App'x at 179. In the second year of the probationary period, the employer discharged the employee for violating plant rules prohibiting excessive absenteeism and lying. *Id.* at 180.

After his discharge, the union's grievance committee met to discuss whether a grievance should be filed. Because the facts tended to support a finding that the employee had violated at

least one plant rule, the union representatives decided not to file a grievance. *Id.* When the employee brought a lawsuit against the union alleging a breach of the duty of fair representation, the district court dismissed it and the Third U.S. Circuit Court of Appeals affirmed. The appellate pointed out that the LCA superseded the CBA and set the standard by which the employee could be discharged. The court then held: "In that light, we have no trouble concluding that the Union's failure to contest Burns' termination on this ground was not arbitrary." *Id.* at 182. *See also Jacobs v. Georgia-Pac. W., Inc.*, 144 F. App'x 608, 609 (9th Cir. 2005) (holding no breach of the duty of fair representation because "[i]n the union's eyes, Jacobs' grievance was meritless, regardless of his version of the events. This decision was neither discriminatory nor made in bad faith.").

In this case, Kastens sought to arbitrate his discharge grievance. The Union investigated, but when it learned that Kastens had an LCA which permitted the Company to discharge him at any time for any type of misconduct, the Union determined that the LCA was controlling and that there was no chance of success in arbitration. As Tom Hammond testified, in his experience representing District 70 since the late 1980s, the Union had never prevailed in an arbitration challenging a discharge based on an LCA. (Tr. 497:24-498:16) And Molina was unable to find any arbitral precedent since the 1940s supporting such a challenge. (Tr. 555:1-15; Resp. Ex. 11)

This last chance language included in the December 6, 2013 suspension notice made it inordinately difficult for the Union to prevail on Kastens's discharge grievance in arbitration. The grievance was further weakened by the fact that Kastens's circulation of the security video was a first-time terminable offense and that he was subject to automatic termination under the Company's disciplinary policies. The Union considered all of these factors in its decision not to arbitrate. Indeed, there was no rational basis for taking the grievance to arbitration. The General

Counsel failed to prove that any of Kastens's grievances were meritorious, and there is no question that the Union fulfilled its duty of fair representation to Kastens.

V. The General Counsel's Theory Is Not Supported by Credible Evidence

As discussed above, the General Counsel's theory is based almost exclusively on the testimony of the Charging Parties. There is a dearth of credible corroborating testimony or documentary evidence having probative value supporting the General Counsel's position. No Union witnesses or neutral witnesses – including Spirit managers or other unit or non-unit employees, or non-unit employees – corroborated the Charging Parties' allegations of wrongful conduct by Union officials. The only witness other than the Charging Parties whose testimony arguably supported the General Counsel's speculations was Jay Cronk, who was not credible for reasons addressed above.

This lack of evidence is compounded by the Charging Parties' questionable motives. Kastens targeted Howard Johnson because he wanted Johnson's official Union position, a fact he admitted at hearing. (Tr. 535:1-8) And in a Facebook post he made shortly after the April 11 incident, Kastens stated: "I'm pushing for his [Johnson's] removal from office more than anything." (Resp. Ex. 2) This indicates that Kastens filed the unfair labor practice charge in bad faith. He has pursued his claims for personal gain, not to vindicate his rights under the Act or to address any unlawful conduct by the Union.

At all relevant times Kastens was a member of Local Lodge 839, which is affiliated with International Association of Machinists and Aerospace Workers, and he was subject to the rules, policies and procedures set forth in the IAM Constitution. The Constitution establishes an internal complaint procedure which provides members a means to bring legitimate complaints of

misconduct by Union officers to the organization for resolution and to seek a trial for the officer's removal in appropriate cases. Article L, Section 2 of the Constitution provides:

> The following actions or omissions shall constitute misconduct by any officer of a L.L., D.L., council or conference, or by any business representative or representative of a L.L. or D.L. which shall warrant a reprimand, removal from office and/or disqualification from holding office for not more than 5 years (except as otherwise provided in Art. VII, Sec. 5), suspension from office, or any lesser penalty or any combination of these penalties as the evidence may warrant:
>
> Incompetence; negligence or insubordination in the performance of official duties; or failure or refusal to perform duties validly assigned.

(Resp. Ex. 5 at 146) The Constitution also establishes orderly procedures for filing a complaint against an officer, presenting evidence, conducting a trial regarding the officer's alleged misconduct, penalties to be issued if the officer is found guilty of misconduct, and a process for the appeal of any holding. (Resp. Ex. 5 at 146-60)

Kastens admitted he was aware that the IAM Constitution provides for an internal complaint procedure against officers, but neither he nor Lehman filed a complaint against Frank Molina, Howard Johnson, or any other Union official based on their alleged misconduct. (Tr. 197:12-198:7) The Board has held that a failure to exhaust internal union remedies does not operate as a bar to an unfair labor practice charge under the Act, so there is no question that the Board has jurisdiction here. *See Operating Engineers*, 148 NLRB 679 (1964). But the failure of the Charging Parties to pursue their internal remedies is notable, especially since Kastens had held numerous official positions in the Union and since he has received extensive training in various aspects of collective bargaining. This failure confirms that Kastens and Lehman were motivated by personal agendas rather than any reasonable belief that they had been harmed by unlawful conduct.

Conclusion

Based on the totality of the evidence in the record and the foregoing arguments and authorities, Respondents International Association of Machinists and Aerospace Workers, District 70 and Local Lodge 839 request that the Administrative Law Judge make appropriate findings of fact and conclusions of law consistent with Respondents' position and issue an order dismissing the complaint in its entirety.

Dated April 3, 2015.

Respectfully submitted,

/s/ Rod Tanner
Rod Tanner
Matt Pierce

Certificate of Service

The undersigned attorney certifies that on April 3, 2015, he served a copy of the foregoing document on the parties listed below via certified mail, return receipt requested.

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